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THE SPIRIT OR THE LETTER OF THE LAW: *OREGON
PARALYZED VETERANS OF AMERICA V. REGAL CINEMAS, INC.*
STRIKES A BLOW FOR JUSTICE WITH QUESTIONABLE
REGULATORY INTERPRETATION

I. INTRODUCTION

Living with disabilities is an unfortunate reality for approximately 500 million people around the world.¹ While some disabled individuals enjoy public visibility and sympathy, such as the late actor Christopher Reeve, countless more carry their cross in relative anonymity.² Many people have never heard of Deke Corbins; yet one can legitimately contend that he suffered just as much as Reeve, after his service in the Vietnam War.³ Furthermore, the

1. See *How Many People Have Disabilities?*, at <http://www.wd4a.co.uk/HowMany.htm> (last visited Apr. 3, 2005) (providing salient global statistics on disabilities).

2. See Laura Dolan, *Family, friends bid 'Superman' farewell*, at <http://www.cnn.com/2004/SHOWBIZ/Movies/10/13/reeve.memorial/index.html> (Oct. 13, 2004) (discussing reaction of Reeve's peers to his untimely demise); see also *The Dirty 2 Dozen*, at <http://www.wapd.org/points/dcorbin/default.htm> (last visited Apr. 3, 2005) (relating troubles encountered by veterans).

3. See Elizabeth G. Meyers *Interview*, at <http://www.wapd.org/points/dcorbin/nv/D2Dpage9/default.htm> (May 1, 2000) (describing war experiences of Corbins). Corbins' immediate injuries were considerable, and he later developed Agent Orange Syndrome. See *id.* (reviewing medical history of veteran). According to Corbins:

I value my life dearly. I'm deeply saddened by the past. A little battle damage . . . Charlie only got half a point for me. I was hit by pieces of a 2.75 rocket. This chicken lost his tailfeathers running the other way. A piece severed my spinal cord, another piece destroyed my left leg. The right one was in bad shape, it was amputated three weeks later because of infection. My left eye was blinded, shrap embedded in the side of my head and eye. Damage to my left abdomen, shoulder and arm. Hearing in my left ear is screwy [sic], it rings a lot and bugs me. That's a hell of a casualty report! I adjusted to my new way of living and eventually accepted the physical disabilities. I overcame the physical problems & hangups that come from becoming disabled. I have a sense of humor about it. Thats [sic] the easy part.

The hard part was the psychological effect. I tend to be a little more anxious than most folks, maybe lots more, The [sic] shellshock never went away. I've flown over the "cuckoo's nest" a few times, doesn't do much good. The shrinks call it PTSD which pretty much means "Poor Turd Still Delusional." Ive [sic] tried every possible means to overcome it so I can have a norml [sic] life. Thirty years later, I still have nightmares, panic attacks, severe insomnia, flashbacks & personality disorders. My mind is there, my body is here. Invisible tripwires trigger it, sometimes its [sic] a memory, sometimes I react. Im [sic] always alert and high-strung. Sleep deprivation makes it worse.

handicapped face difficulties beyond physical and psychological pain; they are also often unable to find employment.⁴

The passing of the Americans with Disabilities Act ("ADA") was a seminal event for the approximately forty million handicapped citizens residing in the United States.⁵ President George H. W. Bush, who signed the ADA into law, described it as a "historic new civil rights Act . . . the world's first comprehensive declaration of equality for people with disabilities."⁶

Nearly fifteen years after its promulgation by Congress, many issues as to the statute's application remain unresolved.⁷ One that has attracted the particular attention of the Department of Justice ("DOJ") is the effect of Title III of the ADA,⁸ and its attendant regulations, regarding stadium-style movie theaters.⁹

In 1994, I started having physical problems, breathing problems and pain. That was the beginning of years of BSing [sic] with the VA, trying to get decent care and find out what was going on. The diagnosis was AO Syndrome, caused by Agent Orange. Progressive physical and mental deterioration and cancers have been making things hard, but Ill [sic] never quit. In the end, it means Charlie got half a point, Uncle Sam got half a point.

Id.

4. See, e.g., K. Kaufmann, *Feds Employ Fewer Disabled*, at <http://www.foxnews.com/story/0,2933,135383,00.html> (Oct. 14, 2004) (investigating claims that federal government does not provide adequate number of jobs for disabled citizens).

5. See 42 U.S.C. §§ 12101-12213 (2005) (laying out various provisions of statute); see also Robin Andrews, Comment, *The Americans with Disabilities Act of 1990: New Legislation Creates Expansive Rights for the Disabled and Uncertainties for Employers*, 21 CUMB. L. REV. 629, 629-31 (1991) (relating relevant facts of congressional "findings" behind statute).

6. Robert L. Burgdorf Jr., *The Americans with Disabilities Act: Analysis and Implications of a Second-Generation Civil Rights Statute*, 26 HARV. C.R.-C.L. L. REV. 413, 413-14 (1991) (quoting President Bush and reporting praise given to ADA).

7. See, e.g., Lisa A. Sciallo, Note, *The ADA Through the Looking Glass*, 68 BROOK. L. REV. 589, 602-09 (2002) (analyzing critically "[t]he Ambiguous Definition of 'Disability' in ADA").

8. See 42 U.S.C. § 12182 (2005) (establishing legal protection for disabled citizens from discrimination in public accommodations). In pertinent part, Section 12182 provides:

(a) General Rule

No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.

Id. § 12182(a).

9. See Felicia H. Ellsworth, Comment, *The Worst Seats in the House: Stadium-Style Movie Theaters and the Americans with Disabilities Act*, 71 U. CHI. L. REV. 1109, 1116-23 (2004) (reviewing relevant case history surrounding question of Title III's effect on stadium-style movie theaters).

In *Lara v. Cinemark USA, Inc.*,¹⁰ the DOJ unsuccessfully attempted to impose its interpretation of one of the pertinent federal regulations – the Americans with Disabilities Act Accessibility Guidelines (“ADAAG”).¹¹ Three years later, the Ninth Circuit recognized the DOJ’s construction in *Oregon Paralyzed Veterans of America v. Regal Cinemas, Inc.*¹²

This Note starts with an evaluation of the salient facts in *Oregon Paralyzed Veterans*.¹³ It then reviews the background legal principles to the issues raised in that case: the ADA, Title III and its enforcing regulations, and the application of these regulations to entertainment venues.¹⁴ In the Analysis section, the Note explains and comments on the relevant legal reasoning of the Ninth Circuit’s majority and dissenting opinions.¹⁵ Finally, the Impact portion offers a modest prediction of the effect *Oregon Paralyzed Veterans* will have on disability law.¹⁶

II. FACTS

In *Oregon Paralyzed Veterans*, the plaintiffs sued Regal Cinemas and Eastgate Theatre, contending that the stadium seating plans in six of the defendants’ movie theatres violated Title III of the ADA and the corresponding regulations of the DOJ.¹⁷ The theatres in question were all built upon the model of “stadium-riser seating,”

10. 207 F.3d 783, 787-88 (5th Cir. 2000) (holding theaters with over three hundred seats must provide wheelchair spaces in more than one location, and smaller facilities need to grant disabled people comparable ticket prices and lines of sight as those enjoyed by non-disabled customers).

11. See *id.* at 789 (announcing ruling of case). The ADAAG provides in relevant part: “[w]heelchairs shall be an integral part of any fixed seating plan and shall be provided so as to provide people with physical disabilities a choice of admission prices and *lines of sight comparable* to those for members of the general public.” See *id.* at 786 (quoting 28 C.F.R. pt. 36, app. A, § 4.33.3 (1999)) (emphasis added).

12. 339 F.3d 1126, 1131 (9th Cir. 2003) (ruling DOJ’s interpretation of requirement under ADA regulation governing public accommodations that disabled patrons have line of sight comparable to those for general public is correct).

13. For a further discussion of the facts of the case, see *infra* notes 17-33 and accompanying text.

14. For a comprehensive discussion of the legal background of *Oregon Paralyzed Veterans*, see *infra* notes 34-116 and accompanying text.

15. For a useful review and critique of the rationale behind the case, see *infra* notes 117-81 and accompanying text.

16. For a further discussion of the immediate and long term effects of the case, see *infra* notes 181-98 and accompanying text.

17. See *Or. Paralyzed Veterans*, 339 F.3d at 1127 (relating procedural posture of case). The plaintiffs-appellants were three disabled Oregonian residents, confined to wheelchairs. See *id.* The Oregon Paralyzed Veterans of America was one of the original plaintiffs, but did not join the appeal. See *id.* at 1127 n.1 (explaining background of appellants).

whereby a majority of customers' seats are placed on stepped risers rather than on a sloped floor.¹⁸

The Ninth Circuit found that the defendants' architecture forced all wheelchair-using patrons to sit in the first several rows of the movie theatre, creating significant disadvantages for disabled customers.¹⁹ At trial, the plaintiffs' expert witnesses asserted that their research evinced a "tremendous disparity" between disabled and non-disabled seating in the defendants' theatres.²⁰ The evidence strongly suggested that such a difference caused pain to wheelchair-using patrons, as opposed to mere annoyance.²¹ The court pointed out that in truth the discrepancy was more pronounced; non-disabled patrons have the ability to angle themselves within a seat for a better view of the movie, a capacity which wheelchair-users certainly lack.²²

The individual plaintiffs offered additional evidence of their own difficult experiences in attempting to watch a movie in the defendants' theaters, which seemed to corroborate the expert wit-

18. *See id.* (describing facts pertinent to current controversy). Due to "a seating configuration that rises at a relatively steep grade," the stadium-style sections of such theaters are virtually impossible to navigate by customers in wheelchairs. *See United States v. Cinemark USA, Inc.*, 348 F.3d 569, 572 (6th Cir. 2003) (looking at similar ADA question in Sixth Circuit).

19. *See Or. Paralyzed Veterans*, 339 F.3d at 1127-28 (discussing layout of theatres in question). In all of the locations, the allotted disabled seating is only available in the first five rows. *See id.* at 1127. In five out of the six theatres, wheelchair-accessible spots are not positioned in the aisle or in the new stadium seating; rather they are only provided for on the sloped portion of the floor – with more than fifty percent of such spots found in the very front row. *See id.* at 1127-28 (recounting *de facto* conditions for disabled customers in defendants' theatres). For a further discussion of the benefits and detriments of stadium-style movie theatres, *see* Joshua D. Watts, Note, *Let's All Go to the Movies, and Put an End to Disability Discrimination: Oregon Paralyzed Veterans of America v. Regal Cinemas, Inc. Requires Comparable Viewing Angles for Wheelchair Seating*, 34 GOLDEN GATE U. L. REV. 1, 2-3 (2004).

20. *See Or. Paralyzed Veterans*, 339 F.3d at 1128 (discussing facts offered by plaintiff to show violation of Title III). Expert testimony offered by the plaintiffs' witnesses, who had personally visited and researched the sites in question, tended to show that the vertical lines of site for the wheelchair seating had an average of approximately 42 degrees, and a range from 24 to 60 degrees. *See id.* In contrast, non-disabled seating locations had an average median line of sight of 20 degrees. *See id.* (providing pertinent information revealed at district court level).

21. *See id.* (describing document in movie industry, which seeks to maximize patron comfort). The Society of Motion Picture and Television Engineers ("SMPTE") published the *SMPTE Engineering Guideline: Design of Effective Cine Theaters* (1994) ("SMPTE Guideline"), which "concluded that, for most viewers, physical discomfort occurs when the vertical viewing angle to the top of the screen exceeds 35 degrees, and when the horizontal line of sight measured between a perpendicular to the viewer's seat and the centerline of the screen exceeds 15 degrees." *Id.* (discussing full effect of evidence offered at trial).

22. *See id.* (describing challenges disabled movie theatre patrons face).

nesses' findings.²³ Kathy Stewmon claimed that she was not able to follow the featured film from the first row and felt dizziness as a result of her proximity to the screen.²⁴ While sitting in the front row, Tina Smith developed nausea and a headache.²⁵ Kathleen Braddy could not finish viewing a movie in the theatre's disabled section because the neck angle required to see well would have blurred her vision; she also complained that the sound was uncomfortable at such a close distance.²⁶

The United States District Court for the District of Oregon was not persuaded by the plaintiffs' arguments and instead granted the defendants' motion for summary judgment.²⁷ The district court held that the specific federal regulation in question, the ADAAG,²⁸ did not require that the wheelchair seating sections in the defendants' movie theatres offer viewing angles comparable to those found in the non-accessible seating.²⁹ In making its decision, the district court expressly adopted the reasoning found in *Lara*.³⁰

23. *See id.* (recounting further derogatory evidence offered against defendants).

24. *See id.* (discussing problems plaintiff encountered at one of sites in question). Kathy Stewmon, who suffers from multiple sclerosis and has been disabled for approximately fifteen years, further submitted that after a short time, at which point she could not "tolerate" her position anymore, her family executed a dangerous maneuver to move her wheelchair up the stairs for a better view of the movie. *See id.* (providing relevant facts that led plaintiffs to file lawsuit).

25. *See Or. Paralyzed Veterans*, 339 F.3d at 1128 (describing health problems experienced by plaintiff Tina Smith at one location in controversy).

26. *See id.* (describing similar detrimental experiences of plaintiffs at defendants' movie theaters). Kathleen Braddy's grandson was with her at the time of the recounted incident, which may have caused additional emotional distress. *See id.* (discussing persons present when plaintiff Braddy experienced her difficulties at one defendants' theaters).

27. *See id.* at 1128-29 (setting forth procedural posture of case).

28. *See* 28 C.F.R. pt. 36, app. A, § 4.33.3 (laying out minimum requirements for conformity with ADA).

29. *See Or. Paralyzed Veterans of Am. v. Regal Cinemas, Inc.*, 142 F. Supp. 2d 1293, 1297-98 (D. Or. 2001) (offering rationale for district court's decision). There is evidence that the district court held, as a matter of law, that "locating the wheelchair-accessible seats only in the non-stadium portion of the theater did not violate § 4.33.3's requirement that the accessible seating be an 'integral part of any fixed seating plan . . .'" *Or. Paralyzed Veterans*, 339 F.3d at 1130 (assessing total effect of district court opinion).

30. *See Or. Paralyzed Veterans*, 339 F.3d at 1130 (offering court's interpretation of lower court decision). The district court found additional support for its ruling in the "plaintiff's acknowledgement that the stadium riser design was not adopted for movie theaters until 1995 – four years after Section 4.33.3 was adopted by DOJ." *Or. Paralyzed Veterans*, 142 F. Supp. 2d at 1297 (providing justification for court's rejection of plaintiffs' ADA claims). This last argument convinced the district court to rule for the defendants, despite what might be considered the plain meaning of the regulation. *See Recent Cases, Civil Rights – Americans with Disabilities Act - Ninth Circuit Holds That Movie Theaters Must Provide Comparable Viewing Angles*

Consequently, the lower court declined to give deference to the DOJ's interpretation of the ADAAG.³¹ After the district court granted summary judgment for the defendants, the plaintiffs appealed to the United States Court of Appeals for the Ninth Circuit.³² The court was thus presented with a factual scenario similar to a number of cases that involved Title III of the ADA, the ADAAG, and entertainment complexes.³³

III. BACKGROUND

A. The Americans with Disabilities Act

According to Congressional estimates, over forty million citizens of the United States suffer from some sort of disability.³⁴ On July 26, 1990, the federal government promulgated the ADA.³⁵ The legislation has garnered positive feedback from both disabled and non-disabled entities.³⁶ On the national level, legal protection for

for *Patrons in Wheelchairs* – Oregon Paralyzed Veterans of America v. Regal Cinemas, Inc., 339 F.3d 1126 (9th Cir. 2003), 117 HARV. L. REV. 727, 729 (2003) [hereinafter *Civil Rights*] (discussing procedural posture of *Oregon Paralyzed Veterans*).

31. See *Or. Paralyzed Veterans*, 339 F.3d at 1130 (describing relevant portions of district court's opinion). In *Oregon Paralyzed Veterans*, the DOJ filed an amicus brief on behalf of the appellants. See *id.* It reiterated the DOJ's interpretation of Section 4.33.3, first seen in *Lara*: "wheelchair locations must be provided lines of sight in the stadium seating seats within the range of viewing angles as those offered to most of the general public in the stadium style seats, adjusted for seat tilt." *Id.* (discussing official litigation position of DOJ in current controversy). The district court rejected this interpretation because it was "unreasonable and inconsistent with the history of Section 4.33.3 . . ." *Or. Paralyzed Veterans*, 142 F. Supp. 2d at 1297-98 (providing reasons for lower court's rejection of DOJ's amicus curiae argument). Additionally, the lower court was unsure whether an amicus brief was a proper medium to announce an agency's official interpretation of a regulation. See *Oregon Paralyzed Veterans*, 339 F.3d at 1130 (describing rationale for district court's ruling).

32. See *Or. Paralyzed Veterans*, 339 F.3d at 1130 (discussing later procedural posture of case).

33. For a further discussion of this body of case law, see *infra* notes 56-115 and accompanying text.

34. See 42 U.S.C. § 12101 (a)(1) (2005) (noting "[t]he Congress finds that . . . (1) some 43,000,000 Americans have one or more physical or mental disabilities, and this number is increasing as the population as a whole is growing older").

35. See Andrews, *supra* note 5, at 629 (discussing history of statute). Members of Congress asserted that the ADA would substantially affect the lives of disabled citizens. See *id.* at 629 n.2 (providing quotes on legislation in question from elected officials in Senate and House of Representatives).

36. See Andrew E. Colsky & Bruce A. Blitman, *An Introduction to Title III of the Americans with Disabilities Act*, 70 FLA. B. J. 95, 96 (June 1996) ("The American With Disabilities Act has significantly affected today's business environment. Individuals with disabilities are now afforded greater rights to participate in daily activities than they ever had before."). The authors went on to note that "[t]he inclusion of the disabled, and the accompanying requirements, may add a welcome flavor to the melting pot we call America." *Id.*

citizens suffering from disabilities began with the Rehabilitation Act of 1973, and achieved a more comprehensive state with the ADA.³⁷ The Rehabilitation Act was based primarily on federal funding; any entity that received such funds was prohibited from discriminating against disabled citizens in employment and public accommodations.³⁸ The ADA is considerably more far-reaching.³⁹

The ADA was designed to be a wide-ranging corrective statute with expansive ramifications.⁴⁰ The statute additionally seeks to level the playing field of life for disabled persons.⁴¹ In its broadest conception, the ADA was devised by its framers and promoters to destroy the “shameful wall of exclusion” that has arisen between the general populace and the handicapped.⁴²

37. See Sciallo, *supra* note 7, at 593-95 (looking at statutory background to ADA).

38. See *id.* at 593-94 (discussing means employed by Rehabilitation Act).

39. See *id.* at 595 (“The ADA changed the face of employment and civil rights law irreversibly.”); see also Burgdorf, *supra* note 6, at 413-14 (reporting that “President Bush described the Act as a ‘historic new civil rights Act . . . the world’s first comprehensive declaration of equality for people with disabilities’”).

40. See *Menkowitz v. Pottstown Mem’l Med. Ctr.*, 154 F.3d 113, 118 (3d Cir. 1998) (analyzing intended purposes of ADA); see also Isaac S. Greaney, Note, *The Practical Impossibility of Considering the Effect of Mitigating Measures Under the Americans with Disabilities Act of 1990*, 26 FORDHAM URB. L.J. 1267, 1273 (1999) (discussing substantial extent to which ADA was meant to be applied). The explicit goals of the statute are:

- (1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities;
- (2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities;
- (3) to ensure that the Federal Government plays a central role in enforcing the standards established in this chapter on behalf of individuals with disabilities; and
- (4) to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.

42 U.S.C. § 12101(b)(1)-(4) (2005); see also *Webb v. Garelick Mfg. Co.*, 94 F.3d 484, 487 (8th Cir. 1996) (considering nature and extent of ADA’s end).

41. See Brent Edward Kidwell, *The Americans with Disabilities Act of 1990: Overview and Analysis*, 26 IND. L. REV. 707, 707 (1993) (“The Americans with Disabilities Act of 1990 (ADA) was enacted to provide equality of opportunity to individuals with disabilities.”).

42. See Laura L. Rovner, *Disability, Equality, and Identity*, 55 ALA. L. REV. 1043, 1058-59 (2004) (quoting President Bush’s remarks upon signing the ADA). For additional bold pronouncements circulated at the time of the enactment of the ADA, see Linda Hamilton Krieger, *Foreword - Backlash Against the ADA: Interdisciplinary Perspectives and Implications for Social Justice Strategies*, 21 BERKELEY J. EMP. & LAB. L. 1, 1 (2000).

To achieve its goals, the ADA is divided into five separate sections, addressing various aspects of daily life.⁴³ Title III of the ADA specifically covers the rights of and remedies available to disabled citizens in “a place of public accommodation.”⁴⁴ In *Pinnock v. International House of Pancakes Franchisee*,⁴⁵ a federal district court upheld Title III against various allegations of unconstitutional vagueness.⁴⁶ Although this constitutional hurdle was overcome, differences in judicial reasoning and statutory interpretation continue to plague the even-handed application of the ADA.⁴⁷

B. The Role of the DOJ

In addition to promulgating the ADA, Congress also enacted a regulatory system to assist owners of places of public accommoda-

43. See *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 675 (2001) (describing general structure of ADA). The statute is basically configured as follows:

Structurally, the ADA consists of five titles. Generally, Title I prohibits discrimination in employment practices on the basis of a disability. Title II prohibits discrimination in the provision of state and local government programs and services, including public transportation. Title III prohibits discrimination against individuals with disabilities in places of public accommodation and with regard to private services providers. Title IV, amended by the Communications Act of 1934, was enacted to improve telecommunications services for hearing-impaired and speech-impaired individuals. Title V contains rules of statutory construction and other miscellaneous provisions.

John A. Liekweg, *The Americans with Disabilities Act, Section 504, and Church-Related Institutions*, 38 CATH. LAW. 87, 88-89 (1998) (footnotes omitted).

44. 42 U.S.C. § 12182(a) (2005) (laying out rules for proper treatment of handicapped persons in “a place of public accommodation”). In relevant part, the statute provides: “[n]o individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.” *Id.*; see also Grant P. Fondo, *Access Reigns Supreme: Title III of the Americans with Disabilities Act and Historic Preservation*, 9 BYU J. PUB. L. 99, 104 (1994) (“Title III of the ADA, entitled Public Accommodations and Services Operated by Private Entities, applies to private entities that are considered ‘places of public accommodations’ and specifically prohibits such places from discriminating against any disabled individual.”) (footnote omitted); D. Russell Hymas & Brett R. Parkinson, Comment, *Architectural Barriers Under the ADA: An Answer to the Judiciary’s Struggle with Technical Non-Compliance*, 39 CAL. W. L. REV. 349, 356 (2003) (discussing with what Title III of ADA is essentially concerned).

45. 844 F. Supp. 574 (S.D. Cal. 1993).

46. See *id.* at 581 (revealing court did not find contested text of Title III, when read along with applicable DOJ pronouncements on subject, to be unconstitutionally vague); see also Emily J. Carton, Comment, *Lethal But Not Disabled?—The Circuits Split on ADA Coverage of the Asymptomatic HIV-Positive Victim*, 103 DICK. L. REV. 129, 135 n.47 (1998) (discussing role DOJ documents played in dismissal of averment of unconstitutionality).

47. For a discussion of the differences among the courts regarding Title III and entertainment complexes, see *infra* notes 56-115 and accompanying text.

tion to comply with Title III.⁴⁸ The DOJ was charged with producing regulations that impart substantive standards for locations covered by Title III.⁴⁹ Congress also directed the Architectural and Transportation Barriers Compliance Board ("Access Board") to create and sustain minimum parameters and norms for Title III and any of its accompanying standards.⁵⁰

The Access Board produced the necessary guidelines, called the Americans with Disabilities Act Accessibility Guidelines, which were in turn taken by the DOJ and issued as federal regulations.⁵¹ Any regulations issued by the DOJ in this matter had to be in accord with the guidelines developed by the Access Board.⁵² The DOJ also provided forum owners with the Technical Assistance Manual ("TAM"), which offers additional relevant interpretations.⁵³

48. See Dennis J. Powers & Eric A. Berg, *Accessibility: Not Just the Owner's Responsibility*, 21 CONSTRUCTION LAW 13, 15 (Spring 2001) (discussing different regulatory elements of ADA).

49. See 42 U.S.C. § 12186(b) (2005) (laying out essential text of requirement); see also *Paralyzed Veterans of Am. v. D.C. Arena L.P.*, 117 F.3d 579, 580 (D.C. Cir. 1997) ("Congress has directed the Department of Justice to flesh out these general principles by 'issu[ing] regulations . . . that include standards applicable to facilities' covered by Title III.") (citing 42 U.S.C. § 12186(b)).

50. See 29 U.S.C. § 792(b)(3)(B) (2005) (providing in relevant part that "[i]t shall be the function of the Access Board to . . . establish and maintain . . . minimum guidelines and requirements for the standards issued pursuant to titles II and III of the Americans with Disabilities Act of 1990").

51. See *Paralyzed Veterans*, 117 F.3d at 580-81 (explaining origins of ADAAG). In relevant part, at the time of the *Paralyzed Veterans* decision, the regulation provided:

Wheelchair areas shall be an integral part of any fixed seating plan and shall be provided so as to provide people with physical disabilities a choice of admission prices and lines of sight comparable to those for members of the general public. They shall adjoin an accessible route that also serves as means of egress in case of emergency. At least one companion fixed seat shall be provided next to each wheelchair seating area. When the seating capacity exceeds 300, wheelchair spaces shall be provided in more than one location. Readily removable seats may be installed in wheelchair spaces when the spaces are not required to accommodate wheelchair users. EXCEPTION: Accessible viewing positions may be clustered for bleachers, balconies, and other areas having sight lines that require slopes of greater than 5 percent. Equivalent accessible viewing positions may be located on levels having accessible egress.

28 C.F.R. pt. 36, app. A, § 4.33.3 (2005).

52. See 42 U.S.C. § 12186(c) (2005) ("Standards included in regulations issued under subsections (a) and (b) shall be consistent with the minimum guidelines and requirements issued by the Architectural and Transportation Barriers Compliance Board in accordance with [Section 12204 of this title].").

53. See Powers & Berg, *supra* note 48, at 15 (describing nature and function of TAM). The TAM does offer commentary on what is mandated by the ADAAG:

In addition to requiring . . . dispersion of wheelchair locations, [Standard 4.33.3] requires that wheelchair locations provide people with disabilities lines of sight comparable to those for members of the general public.

Thus, in assembly areas where spectators can be expected to stand during

However, courts are not always persuaded by the interpretations contained in the TAM.⁵⁴

C. The Application of Title III to Entertainment Venues

The 1990s saw a number of cases in the federal courts that have clarified, to a certain degree, the law surrounding the ADA and entertainment forums.⁵⁵ Initially, significant problems were not foreseen in the application of the ADAAG to movie complexes.⁵⁶ In *Paralyzed Veterans of America v. D.C. Arena L.P.*,⁵⁷ the D.C. Circuit Court of Appeals held that most, but not all, seating spots for disabled patrons need to have sightlines over standing spectators.⁵⁸ In so ruling, the court gave deference to the DOJ's interpretation of the dispositive issue in the case.⁵⁹ The D.C. Cir-

the event or show being viewed, the wheelchair locations must provide lines of sight over spectators who stand. This can be accomplished in many ways, including placing wheelchair locations at the front of a seating section, or by providing sufficient additional elevation for wheelchair locations placed at the rear of seating sections to allow those spectators to see over the spectators who stand in front of them.

Caruso v. Blockbuster-Sony Music Entm't Ctr. at the Waterfront, 193 F.3d 730, 733 (3d Cir. 1999) (citing 1994 DOJ Technical Assistance Manual Supp. ¶ III-7.5180, Conditional App. at 49).

54. See, e.g., *Caruso*, 193 F.3d at 736-37 (rejecting construction of Section 4.33.3 found in TAM). But see *Paralyzed Veterans*, 117 F.3d at 588 (granting deference to TAM).

55. See Katherine C. Carlson, Note, *Down in Front: Entertainment Facilities and Disabled Access Under the Americans with Disabilities Act*, 20 HASTINGS COMM. & ENT. L.J. 897, 903-12 (1998) (providing basic overview of major relevant litigation up to that point).

56. See *id.* at 908 ("The additional requirement that seating 'provide lines of sight and choice of admission price comparable to those for the general public' is fairly easy to achieve in movie theaters where patrons pay a flat rate for attendance (i.e., one not based on their choice of seat) and, as a rule, remain seated.") (footnote omitted).

57. 117 F.3d 579 (D.C. Cir. 1997).

58. See *id.* at 589 (upholding ruling of district court). The district court ruled that "substantial compliance" with Section 4.33.3 was adequate. See *id.* at 583 (spelling out what constituted minimum conformity for defendant). In the context of that case, the lower court was satisfied with a plan creating clear sightlines for wheelchair-bound customers in 78% to 88% of the disabled seating sections respectively. See *id.* at 582 (applying "substantial compliance" test to facts of case). The case centered on the construction of the MCI Center in Washington, D.C., which was a versatile entertainment venue. See *id.* at 580. Plaintiffs sued in anticipation of the problem of non-disabled spectators standing up during events, and thus, blocking the vision of those patrons in wheelchairs. See *id.* (stating important facts of case). The litigation went through various stages and iterations. See Powers & Berg, *supra* note 48, at 13 n.8, 14 ("This is the first of a long line of related cases involving the building of the MCI Center, a multi-purpose arena in Washington, D.C.").

59. See *Paralyzed Veterans*, 117 F.3d at 586-87 (indicating why court arrived at its decision). The court stated that:

cuit upheld this deference against multiple attacks by the appellees: the Access Board in fact drafted the ADAAG, thus the DOJ's interpretation of Section 4.33.3 was not entitled to deference; the DOJ changed its original construction of its own regulation; and the DOJ's new position required notice and comment.⁶⁰

In *Caruso v. Blockbuster-Sony Music Entertainment Centre at the Waterfront*,⁶¹ the Third Circuit took the opposite approach, holding that the defendant did not need to provide disabled patrons with sightlines over standing spectators.⁶² The Third Circuit instead concluded that the ADAAG did not address the question of disabled viewers' sightlines over standing spectators, and furthermore, rejected the regulatory construction of Section 4.33.3 offered by the TAM.⁶³ It ultimately ruled that the entertainment complex's disabled customers were not entitled, as a matter of law, to sightlines over non-disabled patrons.⁶⁴

We have concluded that the language of Standard 4.33.3 is susceptible to Justice's present interpretation and that the statutory scheme contemplates that we would defer to the Department's reasonable interpretations of its regulation as set forth in the technical manual [T]he Department never authoritatively adopted a position contrary to its manual interpretation and as such it is a permissible construction of the regulation.

Id.; see also *Lara v. Cinemark USA, Inc.*, 207 F.3d 783, 787 (5th Cir. 2000) (interpreting *Paralyzed Veterans* to have held that "the Department's TAM is entitled to deference").

60. See *Paralyzed Veterans*, 117 F.3d at 585-88 (rejecting various arguments offered by defendants).

61. 193 F.3d 730 (3d Cir. 1999). The case revolved around an entertainment and music venue, which had 6,200 fixed seats and a lawn area that could hold an additional 18,000 customers. See *id.* at 731. Those occupying the latter area could choose between sitting or standing. See *id.* (stating relevant facts of case). The ADA suit was brought by a disabled veteran and an advocacy group, after the veteran, William Caruso, had an apparently unsatisfactory experience at a concert at defendant's forum. See Adam A. Milani, "Oh Say, Can I See - and Who Do I Sue if I Can't?": *Wheelchair Users, Sightlines Over Standing Spectators, and Architect Liability Under the Americans With Disabilities Act*, 3 FLA. L. REV. 523, 552 (2000) (discussing procedural posture of *Caruso*).

62. See *Caruso*, 193 F.3d at 731, 736-37 (refuting argument that "DOJ Standard 4.33.3 . . . requires wheelchair seats in the E-Center pavilion to afford sightlines over standing spectators"). The TAM provided that "in assembly areas where spectators can be expected to stand during the event or show being viewed, the wheelchair locations must provide lines of sight over spectators who stand." *Id.* at 733 (laying out primary basis for plaintiff's ADA claim).

63. See *id.* at 736-37 (providing main rationale for court's rejection of plaintiff's sightlines contention); see also Thomas W. Merrill & Kristin E. Hickman, *Chevron's Domain*, 89 GEO. L.J. 833, 900 n.328 (2001) (interpreting Third Circuit's treatment of DOJ in *Caruso*); Milani, *supra* note 61, at 556-57 (discussing *Caruso* court's central sightline arguments).

64. See *Caruso*, 193 F.3d at 737 ("The DOJ could, of course, adopt a new substantive regulation to require that wheelchair users be given lines of sight

The court did acknowledge that the entertainment venue must provide wheelchair-bound customers with an approach to the lawn area.⁶⁵ The defendant argued that, since disabled patrons were in fact offered seats nearer the activity for the same cost as lawn seats, there was no violation of Title III.⁶⁶

However, the majority contended that such a policy violated the plain language of the ADA, which provides that “[n]otwithstanding the existence of separate or different programs or activities . . . an individual with a disability shall not be denied the opportunity to participate in such programs or activities that are not separate or different.”⁶⁷ The Third Circuit did exonerate the defendant from the lawn access requirement, if it could demonstrate structural impracticability.⁶⁸ The court remanded the case to determine whether the entertainment forum could meet the “structural impracticability” standard.⁶⁹

In *Independent Living Resources v. Oregon Arena Corporation*,⁷⁰ the District Court of Oregon made substantial contributions to Title III jurisprudence, as specifically applied to entertainment venues.⁷¹ The plaintiffs contended, among other arguments, that the sporting

equivalent to standing patrons – and such a rule certainly has much to recommend it – but to do this it must proceed with notice-and-comment rulemaking.”).

65. See *id.* at 740 (providing reasons for court’s decision to remand case); see also Mark C. Weber, *Exile and the Kingdom: Integration, Harassment, and the Americans with Disabilities Act*, 63 MD. L. REV. 162, 175 (2004) (“In [*Caruso*] . . . the Court of Appeals for the Third Circuit required that a lawn area outside a concert arena be made accessible to wheelchair users, citing the obligation to provide public accommodations in the most integrated setting appropriate to the needs of the individual.”) (footnote omitted).

66. See *Caruso*, 193 F.3d at 738 (setting forth entertainment complex’s argument).

67. *Id.* at 740 (quoting 42 U.S.C. § 12182(b)(1)(c)).

68. See *id.* (setting forth rule to resolve critical issue).

69. See *id.* (discussing subsequent procedural posture of case).

70. 1 F. Supp. 2d 1159 (D. Or. 1998).

71. See *id.* As in *Paralyzed Veterans*, the site in controversy in *Independent Living Resources* was a sporting complex that could be used for a number of different functions. See *id.* at 1161 (presenting salient facts of case). The ADA suit was brought by a wheelchair bound attorney and a non-profit disability advocacy organization against the corporation that owned, built, and operated the entertainment venue in question. See *id.*; see also Christopher E. Tierney, Comment, *Casey Martin, Ford Olinger and the Struggle to Define the Limits of the Americans With Disabilities Act in Professional Golf*, 51 CATH. U. L. REV. 335, 347 (2001) (discussing origins of case); *ADA Title III; Indoor Arena; New Construction*, 22 Mental & Physical Disability L. Rep. (ABA), at 46 (1998) (discussing various pronouncements coming out of case).

complex did not conform to the ADAAG because it did not offer disabled attendees lines of sight over standing patrons.⁷²

The court ruled that the ADA does not mandate that wheelchair-bound patrons be afforded lines of sight over standing customers.⁷³ In doing so, the District Court of Oregon directly clashed with the D.C. Circuit's reasoning, as seen in *Paralyzed Veterans*.⁷⁴ In the lines of sight context, the court considered a key question to be whether the TAM was an acceptable construction of the ADA and its accompanying regulations.⁷⁵ The court acknowledged that the DOJ could insist that disabled patrons be afforded sightlines over standing customers.⁷⁶

72. See *Indep. Living Res. v. Or. Arena Corp.*, 982 F. Supp. 698, 732 (D. Or. 1997) (laying out part of plaintiff's ADA claim); see also Matthew Kensky, Note, *Casey Martin v. PGA Tour, Inc.: Introducing Handicaps to Professional Golf by Widening the Scope of the ADA*, 9 GEO. MASON U. CIV. RTS. L.J. 151, 185 n.215 (1998) (noting plaintiff's various allegations in *Independent Living Resources*).

73. See *Indep. Living Res.*, 982 F. Supp. at 732-58 (considering generally sight-line issue raised by plaintiffs). The district court summarized its reasoning as follows:

Standard 4.33.3 does not presently require that wheelchair users be given lines of sight over standing spectators. Although the ADA would authorize such a requirement, the Access Board and DOJ did not properly promulgate such a rule. Nor can such a requirement be enforced by virtue of the general non-discrimination provisions of the ADA; Congress intended that compliance with the design Standards would satisfy the requirements that new construction be designed and constructed so as to be accessible to persons with disabilities.

In the alternative, if the Court of Appeals decides that defendant was required to provide lines of sight over standing spectators, then defendant has not established any basis, equitable or otherwise, for exempting it from compliance with that requirement.

Id. at 758; see also Jonathan C. Fritts, Note, "Down in Front!": *Judicial Deference, Regulatory Interpretation, and the ADA's Line of Sight Standard*, 86 GEO. L.J. 2653, 2659 (1998) ("Similarly, *Oregon Arena* held that the Rose Garden, located in Portland, Oregon, did not have to comply with the Justice Department's interpretation of Standard 4.33.3 because the 1994 TAM supplement was not issued pursuant to notice and comment procedures.").

74. See *Indep. Living Res.*, 982 F. Supp. at 740 ("Although this court is inclined to give considerable deference to the views of the DC Circuit on matters of federal administrative law, in this instance I respectfully disagree with that Circuit's analysis.").

75. See *id.* at 732 (describing crucial issue in case).

76. See *id.* at 734. The case states:

In summary, DOJ reasonably could have concluded that lines of sight over standing spectators are necessary during events at which spectators are expected (or even encouraged) to stand so that those who watch the event from a wheelchair may obtain a benefit comparable to that received by most ambulatory spectators. The ADA provides ample legal authority to support such a requirement.

Id.

In diametric contrast to *Paralyzed Veterans*, the district court determined that the DOJ had earlier adopted the text of the ADAAG as well as the commentary on the Guidelines issued by the Access Board.⁷⁷ The TAM represented a “significantly different interpretation” of the applicable ADAAG section, and consequently required “notice and comment rulemaking.”⁷⁸ Thus, the court concluded that the relevant TAM portion was an illicit interpretation, because such requirements had not been met.⁷⁹

In *Access Now, Inc. v. South Florida Stadium Corp.*,⁸⁰ the district court faced a question of standing in the sporting venue context.⁸¹ Although the court did not dismiss plaintiff’s case completely, it ruled that valid standing was restricted to those matters where he was “among the injured.”⁸² Thus the plaintiff could not sue for Ti-

77. See *id.* at 742 (laying out germane finding as to DOJ’s past action).

78. *Id.* at 737 (citing *Orengo Caraballo v. Reich*, 11 F.3d 186, 196 (D.C. Cir. 1993)). The court states, “[i]f the Access Board wishes to revise its interpretation of ADAAG 4.33.3 to include a requirement for lines of sight over standing spectators, it will have to do so through notice and comment rulemaking.” *Id.* at 743.

79. See *Indep. Living Res.*, 982 F. Supp. at 743 (“Consequently, the interpretation of Standard 4.33.3 expressed in the 1994 TAM supplement is an attempt to impose a new substantive obligation, which may not be accomplished under the rubric of an ‘interpretive regulation.’”); see also Mark A. Conrad, *Wheeling Through Rough Terrain – The Legal Roadblocks of Disabled Access in Sports Arenas*, 8 MARQ. SPORTS L.J. 263, 283 (1998) (“[T]he Court rejected the idea advocated in *Paralyzed Veterans*, that the 1994 TAM supplement was a valid interpretation regulation In other words, if the ADAAG rule never authorized enhanced sightlines, it was not within the DOJ’s power to do so.”) (footnote omitted).

80. 161 F. Supp. 2d 1357 (S.D. Fla. 2001).

81. See *id.* at 1363 (indicating that one of defendant’s arguments was lack of standing). The case was brought by a wheelchair-bound plaintiff, who alleged that the defendant’s stadium suffered from a number of ADA infractions. See *id.* at 1360-61. In the words of the court:

The Complaint alleges that the Defendants are operating the Stadium in a discriminatory manner prohibited by the ADA and identifies a list of its violations, including: failure to provide unobstructed lines of sight for wheelchair seating; failure to provide the required number of wheelchair accessible locations; failure to integrate unobstructed-sight seating into the overall seating plan; failure to provide the appropriate number of accessible parking spaces; and various other violations, relating to picnic and food service areas, and restrooms.

Id. The complex was home to both a professional baseball and football team. See *id.* at 1360. On at least one occasion, the plaintiff attempted to purchase tickets to a game, but found the disabled seats sold out. See *id.* Though the stadium has a maximum seating capacity of 75,000 for football games, it only reserves 190 for wheelchair-bound patrons; of 40,000 possible baseball seats, only 171 are accessible for the disabled. See *id.* (recounting pertinent facts of case).

82. *Id.* at 1364 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)); see also Adam A. Milani, *Wheelchair Users Who Lack “Standing”: Another Procedural Threshold Blocking Enforcement of Title II and III of the ADA*, 39 WAKE FOREST L. REV. 69, 123 (2004) (“[T]he court held that a wheelchair user had standing to remedy only the barriers he had personally encountered or about which he had actual notice at the time suit was filed.”).

tle III violations that did not affect him directly.⁸³ According to the court in that case, the standing requirement would be met those times when wheelchair-bound or mobility-hindered citizens suffered discrimination.⁸⁴ The differences in judicial approaches regarding Title III of the ADA and entertainment venues were highlighted in the dispute over the ADAAG and stadium-style movie theaters.⁸⁵

D. The ADAAG and Stadium-Style Movie Theaters

1. *Lara v. Cinemark USA, Inc.*

In *Lara*, the Fifth Circuit issued the first federal appellate decision specifically confronting the viewing-angle question.⁸⁶ A number of disabled plaintiffs sued the defendant for operating a stadium-style movie complex, which allegedly had eighteen theaters that violated the ADA.⁸⁷ The defendant provided for wheelchair seating on a flat portion in the front of the theaters, which was not included in the stadium-seating design, with non-disabled seating available on either side of the disabled section.⁸⁸

As a preliminary matter, the court concluded that the ADAAG requires that theaters with over 300 seats provide wheelchair spaces in more than one location; furthermore, smaller facilities must offer people with physical disabilities lines of sight and choices of ticket prices comparable to those enjoyed by the general public.⁸⁹ The Fifth Circuit based this decision on a plain language analysis of

83. See *Access Now*, 161 F. Supp. 2d at 1364 (“To the extent that Plaintiffs complain about violations that would discriminate against blind or deaf persons, or any disabilities other than that suffered by Plaintiff Resnick, they lack standing to pursue such claims.”); see also Milani, *supra* note 82, at 81 n.41 (asserting *Access Now* ruled “plaintiff had standing only for violations that he personally encountered or about which he had actual notice”).

84. See *Access Now*, 161 F. Supp. 2d at 1364 (delineating factual scenarios that would satisfy constitutional standing obligations).

85. For further discussion of the stadium-style venue question, see *infra* notes 86-116 and accompanying text.

86. See 207 F.3d 783 (5th Cir. 2000).

87. See *id.* at 785 (describing procedural posture of case).

88. See *id.* (explaining architectural layout of theaters at issue). The defendant stressed that the normal seating surrounding the wheelchair section is used routinely, including at times when the theater is not otherwise full. See *id.* (providing salient facts of case). At least part of the rationale for this decision is the fact that, due to its steep grade, the stadium-style portion is essentially inaccessible to wheelchairs. See *id.* (setting out position of defendant).

89. See *id.* at 787 (rejecting first argument offered by defendants); see also *Movie Theater; Lines of Sight; Title III*, 24 Mental & Physical Disability L. Rep. (ABA), at 361 (2000) (discussing rules coming out of *Lara* decision); Suzanna Sherry, *Irresponsibility Breeds Contempt*, 6 GREEN BAG 2d 47, 56 n.30 (2002) (stating that *Lara* decision mandates “comparable sight-lines in movie theaters”).

Section 4.33.3 as a whole, presupposing that the DOJ intended that each element of the regulation have some meaning.⁹⁰

The Fifth Circuit then considered what the ADAAG language required for wheelchair spots to be given “lines of sight comparable to those for members of the general public.”⁹¹ It admitted frankly that the federal regulation itself did not provide much direction in this area.⁹²

A proposed modification issued by the Access Board in 1999, which seemed to suggest that the DOJ’s interpretation was not in accord with the text of the ADAAG, substantially influenced the court.⁹³ In addressing the question of lines of sight for disabled viewers, the Access Board acknowledged that it was “considering

90. See *Lara*, 207 F.3d at 787 (citing *Bailey v. United States*, 516 U.S. 137, 143-45 (1995)). The court pointed out that the “lines of sight” text is separate from the dispersal requirement. See *id.* It further averred that since the ADAAG were issued, the DOJ has uniformly considered “choice of admissions prices” and “lines of sight” detached requirements. See *id.* Additionally, Section 4.33.3 requires that wheelchairs be an essential aspect of “any fixed seating plan.” See *id.* Finally, the court stressed that the defendant’s interpretation would exonerate theaters with less than 300 seats from any of the ADAAG’s requirements, frustrating the goals of the ADA. See *id.* (providing rationale for court’s decision applying Section 4.33.3 to theaters in question). Accord *Paralyzed Veterans of Am. v. D.C. Arena L.P.*, 117 F.3d 579, 583 (D.C. Cir. 1997) (holding dispersal requirement in ADAAG is separate from lines of sight requirement).

91. *Lara*, 207 F.3d at 788 (indicating central issue of case was “whether theaters must provide wheelchair-bound moviegoers with comparable viewing angles or simply unobstructed lines of sight”); see also Paul M. Anderson, *A Cart that Accommodates: Using Case Law to Understand the ADA, Sports, and Casey Martin*, 1 VA. SPORTS & ENT. L.J. 211, 233 n.151 (2002) (describing general nature of *Lara*).

92. See *Lara*, 207 F.3d at 788 (explaining current state of uncertainty surrounding question of comparable lines of sight). The Fifth Circuit noted that the viewing angle issue did not come up until after the issuance of the ADAAG. See *id.* Moreover, the 1994 Technical Assistance Manual (TAM), issued by the DOJ, does not treat viewing angle conflicts. See *id.* (laying out evidence of lack of definitive statement in this area of law). Based upon the above, the court concluded that there was no “evidence that the Access Board intended section 4.33.3 to impose a viewing angle requirement . . .” *Id.* at 789 (summarizing reasons for Fifth Circuit’s decision). For an illustrating history of the ADAAG line of sight question before *Lara*, see Fritts, *supra* note 73, at 2659-63 (“The interpretation of Standard 4.33.3 has spawned much litigation against owners and designers of stadia [sic] and arenas.”).

93. See *Lara*, 207 F.3d at 788 (discussing relevant statements on current issue by Access Board). In litigating, the DOJ’s position was that:

[W]heelchair seating locations [in stadium-style theaters] must: (1) be placed within the stadium-style section of the theater . . . ; (2) provide viewing angles that are equivalent or better than the viewing angles . . . provided by 50 percent of the seats in the auditorium . . . ; and (3) provide a view of the screen, in terms of lack of obstruction . . . that is in the top 50 percent of all seats of any type sold in the auditorium.

Id. (quoting 64 Fed. Reg. 62,248, 62,277-78 (Nov. 16, 1999)); see also *Theatre; Wheelchair Seating; Title III*, 25 Mental & Physical Disability L. Rep. (ABA), at 523 (2001) (“In *Lara*, the DOJ filed an *amicus* brief, announcing a new interpretation of

whether to include specific requirements in the final rule that are consistent with the DOJ's interpretation of 4.33.3 to stadium-style movie theaters."⁹⁴

The Fifth Circuit was persuaded to adopt the defendant movie complex's interpretation of the ADAAG.⁹⁵ This decision was based, in part, on the meaning given to sight lines requirements in other federal regulations.⁹⁶ The court expressed further concern that any judicial attempt at establishing a new rule for movie theaters would lack the precision required by the architectural discipline.⁹⁷ The court was additionally wary of construing the ADA according to the subjective and indubitably varied preferences of wheelchair-bound movie theater patrons, which it argued would be the case upon a ruling for the plaintiffs.⁹⁸

In the end, the Court of Appeals was unable to "conclude that the phrase 'lines of sight comparable' requires anything more than

§4.33.3, stating that wheelchair seating must be provided within the range of viewing angles as those offered to most of the general public.').

94. *Lara*, 207 F.3d at 788 (quoting 64 Fed. Reg. 62,248, 62,277-78 (Nov. 16, 1999)). Based upon a reading of the proposal, the Fifth Circuit concluded that the Access Board "recognize[d] that additional language will be necessary to codify the DOJ's litigating position." *Id.* (stating implications of Access Board's proposals). The court also was impressed by the fact that, in the proposed modifications, the Access Board considered line of sight issues solely in the context of obstructed views. *See id.* (considering impact of proposed modifications of Access Board).

95. *See id.* ("Cinemark next contends that its theaters do afford wheelchair-bound moviegoers with 'lines of sight comparable to those for members of the general public.' According to Cinemark, the wheelchair areas are 'comparable' because they are located in the midst of general seating and do not suffer from any obstructions.") (emphasis added).

96. *See id.* at 788-89 (citing evidence casting doubt upon veracity of DOJ's litigating position). To bolster its argument, the court gave the following examples of places where "lines of sight" meant unobstructed view:

47 C.F.R. § 73.685 (2000) (FCC regulation requiring that antennae have line of sight, without obstruction, of the communities that they serve); 46 C.F.R. § 13.103 (2000) (defining direct supervision as having line of sight of the person being supervised); 36 C.F.R. § 2.18 (2000) (forbidding people under age 16 from operating snow mobiles unless they are "within line of sight" of a responsible person over age 21).

Id. (citing various federal regulations). For a consideration of the role these analogies played in the *Lara* court's decision, *see* Milani, *supra* note 61, at 561 n.187.

97. *See Lara*, 207 F.3d at 789 (discussing problems inherent in ruling for plaintiffs). The Fifth Circuit pointed out that Congress mandated the ADAAG so that owners of places of public accommodations would have precise guidelines on how to comply with the ADA. *See id.* Consequently, according to the court, without definite regulatory language, "we must hold that section 4.33.3 does not require movie theaters to provide disabled patrons with the same viewing angles available to the majority of non-disabled patrons." *Id.* (stating holding of case); *see also* Jennifer L. Reichert, *Suit brought by moviegoers who use wheelchairs tests limits of ADA*, 36 TRIAL 133, 134 (July 2000) (commenting on holding of court in *Lara*).

98. *See Lara*, 207 F.3d at 789 (averring additional problems with DOJ's interpretation of Section 4.33.3).

that theaters provide wheelchair-bound patrons with unobstructed views of the screen.”⁹⁹ The court held for the defendant movie complex because its disabled seating section did not have any obstruction problems and was located amidst seating for the public at large.¹⁰⁰

2. *United States v. AMC Entertainment, Inc.*¹⁰¹

In *AMC Entertainment*, an ADA suit brought by the federal government forced the Central District Court of California to consider the same sightline issue that appeared in *Lara*.¹⁰² The court rejected the approach adopted by the Fifth Circuit¹⁰³ and deferred to the view of the DOJ articulated in the *Lara* case.¹⁰⁴

99. *Id.* at 789 (announcing rule coming out of case); see also *Civil Rights*, *supra* note 30, at 727 n.6 (submitting that *Lara* court ruled “that ADA regulations requiring ‘lines of sight comparable’ to those provided nondisabled [sic] patrons demand only that people in wheelchairs have an unobstructed view of the screen, and not that they enjoy comparable viewing angles”).

100. See *Lara*, 207 F.3d at 789 (articulating precise reasons for why defendants prevailed); see also Ellsworth, *supra* note 9, at 1116 (“Under this interpretation, placing wheelchair seating in the front rows of stadium-style theaters, where viewing angles are inferior to those afforded to the general public, does not violate the ADA.”).

101. 232 F. Supp. 2d 1092 (C.D. Cal. 2002).

102. See *id.* at 1094-95 (describing “[n]ature of the [c]ase”). Because this case involved stadium-style movie theaters, the court conducted a comprehensive inquiry into the character and background of that architectural style. See *id.* at 1095-106 (discussing pertinent facts surrounding defendants’ theaters and others similarly designed). Among other pieces of information, the court looked at “The Popularity of Stadium-Style Theaters,” “Wheelchair and Companion Seating Placement,” “Customer Complaints,” “Local Response to Theater Design,” and “A Scholarly View of Theater Seating.” See *id.* at 1095-99 (examining evidence salient to court’s final decision).

The “Scholarly View” section noted academic reflections going as far back as those found in Nineteenth Century Great Britain. See *id.* at 1098-99 (“In 1838, Scottish engineer John Scott Russell published an article entitled ‘Treatise on Sightlines and Seating,’ which has subsequently been described as ‘the first and still definitive statement on the subject of sight lines in modern theater design.’”) (citations omitted); see also *Civil Rights*, *supra* note 30, at 728-29 n.18 (referring to *AMC Entm’t*’s discussion of to what degree stadium movie theaters have been embraced by public); Watts, *supra* note 19, at 3 n.17 (indicating challenges to stadium-style seating covered by both *AMC Entm’t* and *Lara*).

103. See *AMC Entm’t*, 232 F. Supp. 2d at 1110 (“At the outset, the Court notes that it does not find the Fifth Circuit’s opinion in *Lara* . . . to be persuasive.”); see also *Movie Theaters; Wheelchair Access; Title III*, 27-1 Mental & Physical Disability L. Rep. (ABA), at 27-28 (2003) [hereinafter *Case Law Developments*] (commenting on *AMC Entm’t* court’s treatment of *Lara* precedent).

104. See *AMC Entm’t*, 232 F. Supp. 2d at 1113 (summarizing reasons for granting deference to DOJ’s construction of ADAAG and awarding summary judgment on issue to plaintiff government). The government’s position in *Lara*:

“[L]ines of sight” are described by the movie industry itself, and this concept provides a way of measuring the quality of the movie viewing experience The vertical field of vision (to the top and bottom of the

The district court found the interpretation sufficiently reasonable to merit the normal deference given to a government agency.¹⁰⁵ The court frankly discarded a challenge by the defendant that “the DOJ’s position was not worthy of deference because it did not represent a ‘fair and considered judgment on the matter in question.’”¹⁰⁶ Consequently, the district court ruled against the defendant movie theater company on the ADAAG question.¹⁰⁷ The district court acknowledged that under the ADAAG, stadium movie theaters must give disabled patrons “comparable viewing angles.”¹⁰⁸

3. *Meineker v. Hoyts Cinemas Corp.*¹⁰⁹

In *Meineker*, the Second Circuit was presented with the question of how the ADAAG is applied to movie theaters.¹¹⁰ However, because two key issues were first raised on appeal, the court sent the case back to the district level with specific instructions as to the in-

screen), horizontal field of vision, and other similar factors are measured to ensure that the viewer has a line of sight that approaches an optimal viewing zone These same factors are used to determine whether the viewer has a line of sight that results in physical discomfort Once measured, the lines of sight provided to wheelchair users must be comparable to those provided to members of the general public. “Comparable” is an ordinary word used in everyday parlance Wheelchair locations should not be relegated to the worst sight lines in the building, but neither do they categorically have to be the best. Instead, consistent with the overall intent of the ADA, wheelchair users should be provided equal access so that their experience equates that of members of the general public.

Id. at 1106.

105. *See id.* at 1113 (indicating why court ruled for plaintiff on Section 4.33.3 issue).

106. *Case Law Developments*, *supra* note 103, at 28 (indicating AMC *Entm’t* court’s reaction to defenses made by movie complex). For a discussion of the role such judicially recognized deference played in the decision of the Ninth Circuit in *Oregon Paralyzed Veterans of Am. v. Regal Cinemas, Inc.*, 339 F.3d 1126 (9th Cir. 2003), *see infra* notes 117-27 and accompanying text.

107. *See AMC Entm’t*, 232 F. Supp. 2d at 1112 (“For these reasons, the Court concludes that those AMC designs of stadium-style theaters that place wheelchair seating solely on the sloped-floor portion of the theater fail to provide ‘lines of sight comparable to those for members of the general public’; therefore, these designs violates § 4.33.3.”) (footnote omitted); *see also Movie Theaters; Wheelchair Access; Title III; Sight Lines; Integration*, 27-1 Mental & Physical Disability L. Rep. (ABA), at 390 (2003) [hereinafter *Wheelchair Access*] (averring that AMC *Entm’t* “court held that AMC Theatres’ placement of wheelchair accessible seating only in the traditional-seating sections violated the ADA”).

108. *Wheelchair Access*, *supra* note 107, at 390 (reviewing pertinent rules that came out of AMC *Entm’t*).

109. No. 02-9034, 2003 U.S. App. LEXIS 13411 (2d Cir. July 1, 2003).

110. *See id.* at *6 (“Plaintiffs argue principally that defendant failed to comply with § 4.33.3 by (1) failing to provide wheelchair-bound patrons with lines of sight comparable to those afforded the general public; and (2) failing to make wheelchair-accessible seating an integral part of the fixed seating plan.”).

quiry the district court was to conduct.¹¹¹ The Second Circuit was generally concerned with the deference accorded to the DOJ in its interpretation of Section 4.33.3, and if the requirements for such deference were met, whether the movie complex had had sufficient notice of the DOJ's construction.¹¹²

The division in the federal judiciary on the sightline question was exacerbated by two cases decided after *Oregon Paralyzed Veterans*:¹¹³ *United States v. Cinemark USA, Inc.*¹¹⁴ and *United States v. Hoyts Cinemas Corp.*¹¹⁵ This Note will now consider the legal reasoning employed in *Oregon Paralyzed Veterans*, which considered many of the Title III entertainment complex cases that preceded it.¹¹⁶

IV. ANALYSIS

A. Narrative Analysis

1. Deference Given to Agency Regulatory Interpretation

In *Oregon Paralyzed Veterans*, the court stressed the substantial deference that is normally given to agency interpretations of its own regulations, and the fact that such deference directs the court's decision unless it is "'plainly erroneous or inconsistent with the regulation.'"¹¹⁷ The agency's interpretation is also controlling when the regulatory language is ambiguous, so long as the reading "sensibly

111. See *id.* at *14-15 (setting forth directions for district court). The DOJ first became involved in the case when it filed an *amicus curiae* brief on appeal. See *id.* at *7-8 (describing relevant procedural posture of case). According to the court:

The DOJ's submissions present, for the first time on appeal, two important questions: (1) whether the DOJ's interpretation of § 4.33.3 – requiring lines of sight comparable to those afforded to *most* of the general public and seating integral to the area where *most* of the general public chooses to sit – is entitled to deference, and (2) if its interpretation is entitled to deference, whether defendant received reasonable notice of that interpretation at the time of construction or renovation such that the DOJ's interpretation may be applied to the Crossgates theaters.

Id. at *8-9 (emphasis in original); see also *Theaters; Title III; ADAAG; Lines of Sight; Wheelchair*, 27-2 Mental & Physical Disability L. Rep. (ABA), at 683 (2003) [hereinafter *Theaters*] (discussing Second Circuit's resolution of appeal).

112. See *Meineker*, 2003 U.S. App. LEXIS 13411, at *14 ("Whether the DOJ's position is entitled to deference and, if so, whether defendant had reasonable notice of the interpretation sufficient to require defendant to comply with it, are questions for the District Court to determine in the first instance.").

113. For a discussion of these cases, see *infra* notes 184-90 and accompanying text.

114. 348 F.3d 569 (6th Cir. 2003).

115. 380 F.3d 558 (1st Cir. 2004).

116. For a critical analysis of this reasoning, see *infra* notes 158-181 and accompanying text.

117. *Or. Paralyzed Veterans v. Regal Cinemas, Inc.*, 339 F.3d 1126, 1131 (9th Cir. 2003) (quoting *Simpson v. Hegstrom*, 873 F.2d 1294, 1297 (9th Cir. 1989)).

conforms to the purpose and wording of the regulations.”¹¹⁸ Based upon this standard, the Ninth Circuit concluded that the DOJ’s interpretation of the ADAAG was not unreasonable, considering the plain meaning of the regulation in both general and movie theater industry parlance.¹¹⁹ It also affirmed the legitimacy of the medium utilized by the DOJ to promulgate its interpretation of the regulation in question, in direct opposition to the district court.¹²⁰

2. Plain Meaning Analysis

Working from the premise that “lines of sight comparable to those for members of the general public”¹²¹ is the key language at issue in the ADAAG, the court sought to clarify that phrase by first looking at a standard dictionary definition.¹²² The Ninth Circuit then applied *Webster’s* characterization to the movie theater setting, finding that “line of sight” meant a line extending from the patron’s eye to the points on the screen where the action is taking place, considering the angle from the viewer’s eye to those spots.¹²³

The court explored “lines of sight” in the movie theater context, and found that theater owners are urged, when making architectural decisions regarding seating, to ensure that customers will both have a good view of the film and a pain-free experience while at the cinema.¹²⁴ The Ninth Circuit noted that physical discomfort

118. *Id.* (quoting *Lal v. Immigration & Naturalization Serv.*, 255 F.3d 998, 1004 (9th Cir. 2001)).

119. *See id.* at 1131-32 (providing primary reasons for court’s decision to grant deference to DOJ). For a concise summary of why the Ninth Circuit found the DOJ’s litigating position reasonable, *see Theaters*, *supra* note 111, at 682.

120. *See Or. Paralyzed Veterans*, 339 F.3d at 1131 n.6 (“Insofar as the district court suggested that an agency interpretation first advanced in an amicus brief is somehow less valid or less entitled to deference than one promulgated elsewhere, this is a position without legal support.”). The case law in the Ninth Circuit bolstered the court’s assertion, and indicated that the exact same standards of judicial deference applied. *See id.* (citing *Navellier v. Sletten*, 262 F.3d 923, 945 (9th Cir. 2001)); *see also Auer v. Robbins*, 519 U.S. 452, 461 (1997) (conducting normal regulatory analysis despite fact that Secretary of Labor’s interpretation was contained in amicus brief).

121. *See Or. Paralyzed Veterans*, 339 F.3d at 1131 (specifying where main area of conflict is in ADAAG).

122. *See id.* (“Webster’s Third New International Dictionary defines ‘line of sight,’ in relevant part, as ‘a line from an observer’s eye to a distant point (as on the celestial sphere) toward which he is looking or directing an observing instrument.’”).

123. *See id.* (elucidating what “line of sight” at movie theater means in everyday speech).

124. *See id.* at 1131-32 (discussing what is required by SMPTE for “effective” movie theater). For a fuller discussion of SMPTE, *see supra* note 21 and accompanying text.

occurs when patrons are forced to angle their heads or bodies in order to properly view the movie,¹²⁵ and that this type of analysis is seen in various parts of the movie theater industry.¹²⁶ Based on such information, the court concluded that it was reasonable that the DOJ interpretation of “lines of sight comparable” included other factors besides physical obstructions, such as viewing angle.¹²⁷

3. Critique of Lara

In making its decision, the *Oregon Paralyzed Veterans* court specifically criticized the Fifth Circuit’s rationale in *Lara*.¹²⁸ In response to the averment that subjective sitting preferences preclude the objective parsing of “comparability,” the Ninth Circuit argued that non-disabled patrons, regardless of their personal proclivities, were able to choose from a wide range of seats that were objectively comfortable – in sharp contrast to disabled individuals.¹²⁹

The court stressed that, conversely, there is objective evidence that disabled patrons face a substantial risk of pain when attending a movie at one of the stadium theaters in question; while “the SMPTE has determined that physical discomfort occurs ‘for most viewers’ when the viewing angle exceeds 35 degrees[,] the *average* vertical viewing angle for disabled patrons in the subject theaters is

125. See *Or. Paralyzed Veterans*, 339 F.3d at 1132 (emphasizing conditions that cause moviegoers pain during showing of film). In the SMPTE Guideline, the SMPTE stressed that:

[Physical discomfort] occurs when the vertical viewing angle to the top of the screen image is excessive or the lateral viewing angle to the centerline of the screen requires uncomfortable head and/ or body position For most viewers, physical discomfort occurs when the vertical viewing angle to the top of the screen exceeds 35, and when the horizontal line of sight measured between a perpendicular to his seat and the centerline of the screen exceeds 15.

Id. (citing SMPTE Engineering Guidelines at 4-5).

126. See *id.* (discussing relevant position held by association of theater owners). The understanding of viewing angle offered by the SMPTE is consistent with that of the National Association of Theatre Owners (“NATO”), who in fact filed an amicus brief for the defendants-appellees. See *id.*

127. See *id.* at 1133 (stating court’s acceptance of DOJ’s interpretation of Section 4.33.3).

128. See *id.* at 1132; see also *Lara v. Cinemark USA, Inc.*, 207 F.3d 783, 789 (5th Cir. 2000) (holding “in the absence of specific regulatory guidance . . . section 4.33.3 does not require movie theaters to provide disabled patrons with the same viewing angles available to the majority of non-disabled patrons”).

129. See *Or. Paralyzed Veterans*, 339 F.3d at 1132 n.7 (“Able-bodied movie theater patrons in a stadium-style theater may choose from a wide from range of viewing angles, most of which are objectively comfortable according to SMPTE standards, regardless of what personal viewing preferences individuals may have *within* that comfortable range.”) (emphasis in original).

42 degrees.”¹³⁰ This discomfort is exacerbated by the fact that disabled patrons lack the normal flexibility required to maneuver into an acceptable position.¹³¹

Additionally, the *Oregon Paralyzed Veterans* court rejected arguments made by the Fifth Circuit and the Oregon District Court that the legislative and administrative history of the ADAAG supports their decisions,¹³² instead emphasizing the need to affirm the plain meaning of a regulation.¹³³ The court acknowledged that stadium-style theaters were not widely used when the federal regulation in question was first issued, but did not find that fact persuasive.¹³⁴ Instead, the Ninth Circuit submitted that the ADAAG was analogous to a broad statute, which may be applied to situations not expressly considered by its drafters.¹³⁵

4. *Public Policy Considerations in the Court's Decision*

The court ended by stressing the policy benefits that came from its reversing the case and remanding it to the district court.¹³⁶ The Ninth Circuit noted that a main goal of Title III is to guarantee that disabled citizens have access to “‘the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation.’”¹³⁷ The current situation, that able-bodied patrons have a variety of comfortable angles to pick from while disabled viewers are confined to a seating area of objective discomfort, is contrary to this stated goal of Con-

130. *Id.* (emphasis in original) (offering objective evidence that disabled moviegoers are subjected to discomfort).

131. *See id.* (articulating Ninth Circuit's critique of *Lara*).

132. *See id.* at 1132 (providing rationale for court's decision to reverse).

133. *See id.* at 1132 n.9 (citing *Wash. State Dep't of Soc. & Health Servs. v. Guardianship Estate of Keffeler*, 537 U.S. 371 (2003)).

134. *See Or. Paralyzed Veterans*, 339 F.3d at 1132-33 (discussing points of agreement with Fifth Circuit as to current issue before court). The court also admitted that the older style sloped movie theaters did not exhibit the severe difference between disabled and non-disabled viewing angles that appears in modern stadium theaters. *See id.* at 1132.

135. *See id.* at 1133 (citing *Pa. Dep't of Corr. v. Yeskey*, 524 U.S. 206, 212 (1998)). The court indicated that there existed no sufficient argument against viewing regulations as equal to statutes in this particular context. *See id.* Thus, “a broadly-drafted regulation – with a broad purpose – may be applied to a particular factual scenario not expressly anticipated at the time the regulation was promulgated” *Id.* at 1133 (stating court's view on broad regulations). The court considered the ADAAG just such a regulation. *See id.* (considering scope of Section 4.33.3).

136. *See id.* (asserting court's resolution of current controversy).

137. *Id.* (quoting 42 U.S.C. § 12182(a)).

gress.¹³⁸ Consequently, *Oregon Paralyzed Veterans* explicitly gave deference to the DOJ, adopted its interpretation of the ADAAG, and granted the summary judgment motion for the plaintiffs regarding their ADA claim.¹³⁹

5. *Concerns Raised by the Dissent*

Writing in dissent, Justice Kleinfeld made several arguments in opposition to the court's ruling.¹⁴⁰ Initially, the dissent expressed concern over the circuit split that was created by the majority's adoption of the DOJ's interpretation of the ADAAG.¹⁴¹ It also stressed the importance of leaving the current interpretational controversy in the hands of the entity that drafts the guidelines.¹⁴²

The guidelines were originally written by the Access Board, which was directed by Congress to "[establish] and [maintain] minimum guidelines and requirements for the standards issued pursuant to' Title III of the A.D.A."¹⁴³ The DOJ then adopted these guidelines as federal regulations: the ADAAG.¹⁴⁴

In arguing that the Access Board should address the sightline question, as opposed to the courts, Justice Kleinfeld pointed out that federal law demands that "[s]tandards included in regulations . . . shall be consistent with the minimum guidelines and require-

138. *See id.* ("We find it simply inconceivable that this arrangement could constitute 'full and equal enjoyment' of movie theater services by disabled patrons."). The court had searching criticism for what it took to be the view of the district court: so long as there is no physical obstruction of the screen, the wheelchair-bound viewer can suffer any number of other indignities and the "DOJ is not free to interpret its own regulation as requiring anything more." *Id.* (offering court's interpretation of lower court opinion).

139. *See Or. Paralyzed Veterans*, 339 F.3d at 1133 (stating how Ninth Circuit ultimately resolved pertinent issue). The court held that the "DOJ's interpretation of 'lines of sight comparable to those for members of the general public' in § 4.33.3 to require a viewing angle for wheelchair seating within the range of angles offered to the general public in the stadium-style seats is valid and entitled to deference." *Id.*

140. *See id.* at 1133 (Kleinfeld, J., dissenting) ("The majority sets up a conflict with the Fifth Circuit, adopts an unreasonable construction of the applicable regulation, and puts theater owners in a position of impossible uncertainty as to what they must do to comply with the law.") (footnote omitted).

141. *See id.* at 1136 (Kleinfeld, J., dissenting) (noting direct conflict existing between Fifth and Ninth Circuits). Justice Kleinfeld was troubled by the fact that theater owners now faced uncertainty in building theaters based upon geography, despite the national character of the Americans with Disabilities Act. *See id.* ("A purportedly uniform federal regulation now means something different in the Ninth Circuit from what it means in the Fifth.").

142. *See id.* at 1133-34 (Kleinfeld, J., dissenting) (indicating which body is best suited to answer current dispute).

143. *Id.* at 1129 (quoting 29 U.S.C. § 792(b)(3)(B)).

144. *See id.* (providing source of ADAAG).

ments issued by the Architectural and Transportation Barriers Compliance Board”¹⁴⁵ The dissent went so far as to submit that the Access Board route would be a “fair process,” even if it produced a decision that suffered from substantive defects.¹⁴⁶ Evidence suggested that the Access Board was not going to adopt the DOJ’s position.¹⁴⁷

Justice Kleinfeld contended not only that the Access Board should be given time to make its decision, but that the court’s own judgment in these matters was fraught with deficiencies.¹⁴⁸ The dissent averred that the Ninth Circuit’s ruling would *unfairly*¹⁴⁹ force theater owners to spend substantial sums of money on reconstructing movie sites;¹⁵⁰ furthermore, *Oregon Paralyzed Veterans* provided vague and imprecise guidelines for this expenditure.¹⁵¹

145. *Or. Paralyzed Veterans*, 339 F.3d at 1133 (Kleinfeld, J., dissenting) (quoting 42 U.S.C. § 12186(c)).

146. *See id.* at 1134 (Kleinfeld, J., dissenting) (stating support for leaving Section 4.33.3 determination with Access Board). The dissent also noted the logical difficulties with the DOJ’s interpretation. *See id.* (“[I]t is hard to justify a gloss on the statute that requires wheelchair users to have a *better* view than half or more of the seats”) (emphasis in original).

147. *See id.* at 1133-34 (Kleinfeld, J., dissenting) (noting recent statements by Access Board concerning Section 4.33.3). Apparently, in a “Notice of Proposed Rulemaking,” the Access Board announced that it was analyzing the stadium-style seating problem on display in *Oregon Paralyzed Veterans* and other cases. *See id.* (citing 64 Fed. Reg. 62,248, 62,278 (Nov. 16, 1999)). The Access Board acknowledged the DOJ’s position, namely that disabled sight lines must be “‘equivalent to or better than the viewing angles provided by 50 percent of the seats in the auditorium.’” *Id.* at 1134 (discussing consideration Access Board has given to DOJ interpretation). However, the Access Board made clear that it had not yet adopted such a position. *See id.* Additionally, while it granted the importance of facilitating good sightlines for the disabled, the Access Board stressed the dangers attendant to the DOJ’s interpretation – the existence of uncertainty as to measuring compliance. *See id.* Consequently, as of 1999, “‘the Board is proposing to amend the guidelines to include specific technical provisions’ governing sight lines.” *Id.* at 1134 (recounting Access Board’s consideration of “promulgating new regulations for ‘stadium-style motion picture theaters’”).

148. *See id.* at 1134 (Kleinfeld, J., dissenting) (“It is striking to contrast the just approach of the Access Board with the unjust approach of the majority decision.”).

149. *See id.* (“Regulating movie theater architecture retroactively by vague judicial fiat is unjust.”).

150. *See Or. Paralyzed Veterans*, 339 F.3d at 1134 (Kleinfeld, J., dissenting) (expressing concern that Ninth Circuit’s holding will apply retroactively). The dissent noted that the theaters affected by the majority’s decision will be forced to renovate, despite the fact that these locations were “built in compliance with the law according to the best knowledge of design professionals at the time.” *Id.* (pointing out equitable shortcomings of majority’s rationale).

151. *See id.* (indicating application problems of majority’s rule). Justice Kleinfeld broadly asserted that it was impossible to glean from the Ninth Circuit’s opinion what would be sufficient for minimal compliance. *See id.* (“If a judge on the panel cannot say just what is required, how can a movie theater owner?”). The dissent further argued that the majority was reckless and “irresponsible” to pro-

Justice Kleinfeld broadly asserted that the DOJ's interpretation of the ADAAG, adopted by the majority, is unreasonable considering its dating and the structure of the relevant federal regulations.¹⁵² According to the dissent, the Ninth Circuit failed to recognize that the other requirements of the ADAAG make its sightline ruling difficult to enforce.¹⁵³ Additionally, it argued that

mulgate a wide-ranging rule without specific directions as to how it is to be achieved. *See id.* (charging majority with dereliction of duty). Justice Kleinfeld contrasted the problems attendant to the Ninth Circuit's decision with positive benefits of allowing the Access Board to complete its evaluation:

When and if the Access Board promulgates a regulation, architects will know before a movie theater is built how they must design it, and owners of existing theaters will know what reconstruction they must perform We ought to leave the Access Board process alone. If the Access Board adopts the Justice Department's position or something like it, the requirements will be clear, precise, and prospective

All the majority tells us with any clarity is that it is not satisfied with the existing state of affairs, where wheelchair patrons sit in the front rows. But architects and theater owners need to know, not only what the Ninth Circuit rejects, but what construction and reconstruction will be acceptable. That is why the regulations delimit knee space to the millimeter. Judicial opinions cannot be written that way, *which is a good reason why we should not try to rewrite the regulations as the majority does.*

Id. at 1134, 1137 (emphasis added). The dissent was further critical of the majority's efforts at elucidation of its position, arguing that "within the range of angles" does not speak with more clarity than "comparable." *See id.* at 1136 (contending that majority provides no positive, architectural direction to theater owners).

152. *See id.* (Kleinfeld, J., dissenting) (giving additional reasons for dissent). The dissent found justification for this position in the fact that the "Access Board implicitly acknowledges that the Justice Department is arguing for creation of new law rather than a permissible construction of existing regulations." *Id.* at 1134 (noting Access Board's view of DOJ interpretation of Section 4.33.3). Justice Kleinfeld pointed out critically that despite acknowledging that stadium seating was not expressly considered in the ADAAG, because they did not exist when the regulation was promulgated, the majority interprets that federal regulation to address them. *See id.* at 1137 ("If the regulation did not contemplate stadium seating, the only fair inference is that it did not provide specially for it."). Furthermore, the dissent stressed that if providing wheelchair seating in the front of the movie theater was allowed before stadium theaters were introduced, it seems untenable to conclude that such a policy is now proscribed in stadium theaters. *See id.* at 1137 (indicating failings in majority's reasoning).

153. *See id.* at 1135 (Kleinfeld, J., dissenting) (stressing importance of reading Section 4.33.3 in its entirety). The ADAAG requires that, "wheelchair areas be 'an integral part' of the fixed seating plan, that they 'adjoin an accessible route' that also serves as an emergency exit, that they be adjacent to 'companion' seating, and that they have 'lines of sight comparable to those for members of the general public.'" *Id.* (stating what ADAAG fully requires of movie theaters).

The dissent contends that the majority failed to properly consider these other requirements, which give meaning to the sightline obligation. *See id.* Furthermore, these provisions, taken in the aggregate, may make realization of the DOJ's goal difficult. *See id.* For example, according to Justice Kleinfeld, if the disabled can't be secluded from the general populace, yet need to be near an easy exit, the front of the theater may well be the only place wheelchairs can be situated. *See id.* (raising practical doubts about approach of majority).

the DOJ's construction of "comparable" in the regulation was not in accord with the plain meaning of that word.¹⁵⁴

Justice Kleinfeld was troubled by the subjective inclinations of moviegoers and the effect that reality has upon the ADAAG and its interpretation.¹⁵⁵ Furthermore, he indicated that the majority's ruling was not consistent with its adoption of the DOJ position.¹⁵⁶

154. See *id.* (Kleinfeld, J., dissenting) (submitting that "[w]hat this case is really all about is the meaning of the word 'comparable' in the 'lines of sight' regulation"). The dissent recognized that the DOJ equated "comparable" with "'equivalent to or better than the viewing angles . . . provided by 50 percent of the seats.'" *Id.* (analyzing litigating position of DOJ). Using the American Heritage Dictionary as a benchmark, Justice Kleinfeld contended that the plain meaning of "comparable" was "similar or equivalent," definitely not "better than." *Id.* (pointing out supposed logical failings in DOJ's interpretation). The dissent found further inconsistency in the fact that the DOJ required disabled viewing angles to be comparable to "50 percent of the seats," instead of "comparable to the viewing angles provided by non-wheelchair seating." *Id.* Justice Kleinfeld indicated that the latter phrase would be a more natural construction of "comparable." *Id.* (laying out dissent's interpretational criticisms of majority).

155. See *Or. Paralyzed Veterans*, 339 F.3d at 1136 (Kleinfeld, J., dissenting) (providing rationale for dissenting position). The dissent pointed out that, according to accepted mathematical understandings, no two seats in a theater have identical viewing angles. See *id.* (raising doubts about DOJ's interpretation of federal regulation). Justice Kleinfeld further contended that where a patron enjoys sitting at a movie theater is a considerably subjective decision, and that such preferences diverge widely. See *id.* (citing *Lara v. Cinemark USA, Inc.*, 207 F.3d 783, 789 (5th Cir. 2000)). To illustrate its point, the dissent observed that:

Some people like to sit in front, for maximum size of picture and stereo effect of the sound, and to avoid distractions from people in front of them. Some people like to sit in back, for the greater height and sense of separation from the picture. Some like the aisles, so they can get out easily to go to the bathroom or the popcorn stand. Some like the center, so they won't be distracted by the people who get up during the movie to go [to] the bathroom or the popcorn stand.

Id. From such premises, Justice Kleinfeld concluded that it is not physically possible for the lines of sight for disabled viewers to be comparable to all of these different seats and seating sections, unless wheelchair seating is dispersed throughout the theater – something explicitly not required for small theaters. See *id.* (discussing infeasibility of DOJ's contention). Additionally, the dissent stressed that the disabled spots are comparable to the other seating available in the front of the theater; this seating section cannot be discounted, according to Justice Kleinfeld, because the ticket price for the location is the same as for elsewhere in the theater – this would not be the case if there were no customers who preferred sitting there. See *id.* (concluding "the regulation plainly does not mean what the Justice Department says it means (and what the majority opinion may or may not imply that it means)").

156. See *id.* (Kleinfeld, J., dissenting) (alleging disjunction between theory and application of rule by majority). Justice Kleinfeld argued that the majority's rule, requiring viewing angles for disabled patrons to be within the range of angles offered to the general public, had been literally met by the defendants. See *id.* ("The seating in the theaters before us already does provide wheelchair viewing angles 'within the range of angles offered to the general public,' so the words the majority uses cannot mean what they say, since the majority directs summary judgment against the theaters."). Since wheelchair seating was located amidst non-

While there was support for the Ninth Circuit's conclusion, its rationale had areas open to criticism.¹⁵⁷

B. Critical Analysis

In *Oregon Paralyzed Veterans*, the majority advanced the overall interests of handicapped citizens,¹⁵⁸ but may have gone beyond the bounds of the ADA in doing so.¹⁵⁹ The Ninth Circuit properly acknowledged the significant deference that is normally accorded agencies in the construal of regulations they have issued.¹⁶⁰ Furthermore, it correctly identified the key issue to be determined in the sightline argument: whether the DOJ's interpretation of the ADAAG was sufficiently reasonable in order to be given such customary deference.¹⁶¹

disabled seating in the first five rows in the theaters in question, and that non-disabled seating was part of the general seating plan, the dissent contended that disabled patrons did have viewing angles within the range of those offered to the general public. *See id.* at 1136-37 ("Where there are regular seats to the left and right of a wheelchair seat, it is a geometric certainty that the angle of view from the wheelchair seat will be greater than the angle from one, and less than the angle from the other, so that it is necessarily 'within the range of angles' of the two adjacent seats."). Justice Kleinfeld also took issue with the majority's assertions about the inability of wheelchair viewers to crane their necks, by pointing out that those limitations are due to the way wheelchairs are manufactured, an area in which movie theaters have no say. *See id.* at 1137 (answering specific sections of majority opinion).

157. For a further discussion of the critique of *Oregon Paralyzed Veterans*, see *infra* notes 169-81 and accompanying text.

158. *See Theaters*, *supra* note 111, at 683 (announcing decision of *Oregon Paralyzed Veterans* and its effect upon handicapped citizens).

159. *See Lara v. Cinemark USA, Inc.*, 207 F.3d 783, 788 (5th Cir. 2000) (arguing that DOJ interpretation of Section 4.33.3, adopted by *Oregon Paralyzed Veterans* majority, requires "additional language" to become law).

160. *See Or. Paralyzed Veterans*, 339 F.3d at 1131 (discussing relevant rules of interpretation to be applied to ADAAG text in question); *see also Caruso v. Blockbuster-Sony Music Entm't Ctr. at Waterfront*, 193 F.3d 730, 733 (3d Cir. 1999) (citing *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994)). The court stated, "an agency's interpretation of its own regulation 'must be given controlling weight unless it is plainly erroneous or inconsistent with the regulation . . .'" *Caruso*, 193 F.3d at 733 (citing *Shalala*, 512 U.S. at 512). The court was also right in pointing out that a Justice Department interpretation that appears in an amicus brief is just as valid as if it had been promulgated through another medium. *See Or. Paralyzed Veterans*, 339 F.3d at 1131 n.6 (criticizing legal reasoning of district court).

161. *See Or. Paralyzed Veterans*, 339 F.3d at 1132 ("The question here, then, is whether it is unreasonable for DOJ to interpret 'comparable line of sight' to encompass factors in addition to physical obstructions, such as viewing angle."); *see also Meineker v. Hoyts Cinemas Corp.*, No. 02-9034, 2003 U.S. App. LEXIS 13411, at *14-15 (2d Cir. July 1, 2003) (remanding sightline movie theater case to district court to determine "[w]hether the DOJ's position is entitled to deference").

The Ninth Circuit provided a substantial number of relevant documents to show that in general, and particularly in the context of movie complexes, “comparable line of sight” includes factors beyond mere tangible obstructions – including “viewing angle.”¹⁶² The court relied upon this data, instead of the contrary evidence offered by the Fifth Circuit, in answering the line of sight question.¹⁶³ The facts produced by the court suggest that the DOJ’s construal of the ADAAG is reasonable.¹⁶⁴

The Ninth Circuit made a compelling argument that the status quo in stadium-style movie theaters is not in accord with the philosophy of the ADA.¹⁶⁵ It rightfully stressed that one of the main purposes of Title III is to guarantee that disabled patrons have the same opportunities for “full and equal enjoyment” as non-handicapped citizens.¹⁶⁶ When this verity is considered with the fact that,

162. See *Or. Paralyzed Veterans*, 339 F.3d at 1131-32 (providing reasons why court found DOJ’s litigating position reasonable). The court found compelling evidence for this proposition in a commonly used dictionary. See *id.* at 1131 (“Webster’s Third New International Dictionary defines ‘line of sight,’ in relevant part, as ‘a line from an observer’s eye to a distant point (as on the celestial sphere) toward which he is looking or directing an observing instrument.’”). Additionally, the Ninth Circuit justified its inclusion of viewing angles in its understanding of lines of sight, by quoting from the SMPTE Guidelines:

In addition to ensuring that everyone will see well, seating in the effective cine theater must avoid physical discomfort, which occurs when the vertical viewing angle to the top of the screen image is excessive or the lateral viewing angle to the centerline of the screen requires uncomfortable head and/ or body position. Since the normal line of sight is 12 to 15 below the horizontal, seat backs should be tilted to elevate the normal line of sight approximately the same amount. For most viewers, physical discomfort occurs when the vertical viewing angle to the top of the screen exceeds 35, and when the horizontal line of sight measured between a perpendicular to his seat and the centerline of the screen exceeds 15.

Id. at 1131-32. The court bolstered its contention by noting that the NATO measured sightlines in degrees. See *id.* at 1132 (laying out argument for why plaintiffs were correct in their ADA claim); see also Watts, *supra* note 19, at 14-15 (discussing role SMPTE Guidelines played in court’s decision).

163. See *Lara*, 207 F.3d at 788-89 (citing various federal regulations in rejecting DOJ’s interpretation of ADAAG). The Ninth Circuit is not alone in its rejection of this *Lara* argument. See *United States v. Cinemark USA, Inc.*, 348 F.3d 569, 578 (6th Cir. 2003) (declining to follow *Lara* precedent); see also *United States v. AMC Entm’t, Inc.*, 232 F. Supp. 2d 1092, 1110 (C.D. Cal. 2002) (“None of the federal regulations cited by the Fifth Circuit have any applicability here.”).

164. See *Or. Paralyzed Veterans*, 339 F.3d at 1132-33 (according deference to DOJ’s litigating position); see also Ellsworth, *supra* note 9, at 1123 (concluding DOJ’s interpretation of Section 4.33.3 is correct enough to control sightline cases).

165. See *Or. Paralyzed Veterans*, 339 F.3d at 1133 (offering additional reasons for court’s favorable decision for plaintiffs); see also Watts, *supra* note 19, at 16-17 (describing rationale behind *Oregon Paralyzed Veterans*).

166. See *Or. Paralyzed Veterans*, 339 F.3d at 1133 (quoting 42 U.S.C. § 12182(a)); see also Matthew A. Stowe, Note, *Interpreting “Place of Public Accommodation” Under Title III of the ADA: A Technical Determination with Potentially Broad Civil*

according to scientific research, the *average* viewing angle in the wheelchair section of the theaters in question was beyond the physical discomfort angle,¹⁶⁷ the court seems correct in its public policy conclusion.¹⁶⁸

However, *Oregon Paralyzed Veterans* suffers from possible deficiencies in both the interpretational conclusion it reached and the application of the rule it announced.¹⁶⁹ At the time of the decision, the language of the ADAAG did not substantially answer if movie complexes had to grant comparable viewing angles to disabled patrons or merely unobstructed lines of sight.¹⁷⁰ Problems centering on viewing angles did not come up until significantly after the Justice Department issued the federal regulation in question.¹⁷¹ Several sources have raised legitimate doubt that the ADAAG was purposed by its drafters to mandate a viewing angle requirement on

Rights Implications, 50 DUKE L.J. 297, 297 (2000) ("Congress's purposes in enacting the ADA were 'to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities' and to 'bring persons with disabilities into the economic and social mainstream of American life.'"). In relevant part, that provision of the ADA provides, "[n]o individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation." 42 U.S.C. § 12182(a) (2005).

167. See *Or. Paralyzed Veterans*, 339 F.3d at 1132 n.7 (discussing salient facts gleaned from district court trial). The court observed "that the SMPTE has determined that physical discomfort occurs 'for most viewers' when the viewing angle exceeds 35 degrees; the *average* vertical viewing angle for disabled patrons in the subject theaters is 42 degrees." *Id.* (emphasis in original) (concluding "that disabled patrons would likely experience discomfort in" defendants' movie complexes); see also *Civil Rights*, *supra* note 30, at 729 ("Judge Betty Fletcher, writing for the panel, argued that placing wheelchair seating on the floor creates 'significant disadvantages' for people in wheelchairs, noting that the seats' average viewing angle exceeded the angle at which physical discomfort likely would occur.").

168. See Watts, *supra* note 19, at 34 (contending that *Oregon Paralyzed Veterans* decision was in accord with justice, reason, and Title III of ADA); see also Ellsworth, *supra* note 9, at 1139 ("There is no doubt that the Justice Department is achieving the right results (albeit to some disadvantage to the theaters) by pressing the viewing-angle requirement for stadium-style theaters.").

169. See *Civil Rights*, *supra* note 30, at 730-34 (describing problems in Ninth Circuit's holding and offering corresponding solutions); see also Watts, *supra* note 19, at 20-28 (providing instructive criticism of *Oregon Paralyzed Veterans*).

170. See *Lara v. Cinemark USA, Inc.*, 207 F.3d 783, 788 (5th Cir. 2000) (discussing present lack of clarity surrounding question of application of Section 4.33.3 to stadium-style movie theaters); see also Fritts, *supra* note 73, at 2659-63 (providing overview of case law on ADAAG and entertainment venues).

171. See *Lara*, 207 F.3d at 788 (setting forth pertinent chronology for present case). Additionally, the TAM fails to cover viewing angle disputes. See *id.* (articulating privation of authoritative pronouncements concerning Section 4.33.3's sightlines requirement); see also Powers & Berg, *supra* note 48, at 15 n.25 (referring to *Lara's* treatment of TAM).

entertainment venues.¹⁷² Furthermore, it can be maintained that the DOJ's construction of "comparable" in the regulation was not in accord with the plain meaning of that word and consequently unreasonable.¹⁷³ The court's ruling is also disadvantaged by the subjective inclinations of moviegoers and the effect that reality has upon the ADAAG and its interpretation.¹⁷⁴

172. See *Lara*, 207 F.3d at 788-89 (contending that DOJ's interpretation does not meet requirements for deference). In *Lara*, the Fifth Circuit based its rejection of Justice Department's construction of Section 4.33.3 on statements issued by the Access Board and the meaning of sightline in other federal regulations. See *id.* at 788. In 1999, the Access Board publicly considered changing the ADAAG, and implicitly "recognize[d]" that additional language will be necessary to codify the DOJ's litigating position." *Id.* (interpreting 64 Fed. Reg. 62248, 62277-78 (Nov. 16, 1999)). But see *United States v. AMC Entm't, Inc.*, 232 F. Supp. 2d 1092, 1110-11 (C.D. Cal. 2002) (disputing *Lara's* reading of Access Board's statements).

Lara also supported its position, considering the lack of more relevant authority, by pointing out that sightline was understood to be unobstructed view in several federal regulations. See *Lara*, 207 F.3d at 788-89 (citing 47 C.F.R. § 73.685 (2000)). But see *United States v. Cinemark USA, Inc.*, 348 F.3d 569, 578 (6th Cir. 2003) (contending that *Lara* court erred in making C.F.R. analogy argument). For a full discussion of the Fifth Circuit's reasoning in *Lara*, see *supra* notes 86-100 and accompanying text.

173. See *Or. Paralyzed Veterans v. Regal Cinemas, Inc.*, 339 F.3d 1126, 1135 (9th Cir. 2003) (Kleinfeld, J., dissenting) (providing arguments in opposition to majority). The dissent recognized that the DOJ equated "comparable" with "equivalent to or better than the viewing angles . . . provided by 50 percent of the seats." *Id.* (analyzing litigating position of DOJ). Using The American Heritage Dictionary as a benchmark, Justice Kleinfeld contended that the plain meaning of "comparable" was "similar or equivalent," definitely not "better than." *Id.* (pointing out supposed logical failings in DOJ's interpretation). The dissent found further inconsistency in the fact that the DOJ required disabled viewing angles to be comparable to "50 percent of the seats," instead of "comparable to the viewing angles provided by non-wheelchair seating"; Justice Kleinfeld indicated that the latter phrase would be a more natural construction of "comparable." *Id.* (laying out dissent's interpretational criticisms of majority).

174. See *id.* at 1136 (Kleinfeld, J., dissenting) (providing rationale for dissenting position). The dissent pointed out that, according to accepted mathematical understandings, no two seats in a theater have identical viewing angles. See *id.* (raising doubts about DOJ's interpretation of federal regulation). Justice Kleinfeld further contended that where a patron enjoys sitting at a movie theater is a considerably subjective decision, and that such preferences diverge widely. See *id.* (citing *Lara*, 207 F.3d at 789). Justice Kleinfeld concluded that it is not physically possible for the lines of sight for disabled viewers to be comparable to all of these different seats and seating sections, unless wheelchair seating is dispersed throughout the theater – something explicitly not required for small theaters. See *id.* Additionally, the dissent stressed that the disabled spots are comparable to the other seating available in the front of the theater. See *id.* This seating section cannot be discounted, however, because the ticket price for the location is the same as for elsewhere in the theater – this would not be the case if there were no customers who preferred sitting there. See *id.* (concluding "the regulation plainly does not mean what the Justice Department says it means (and what the majority opinion may or may not imply that it means)").

Oregon Paralyzed Veterans is open to criticism on a practical level as well.¹⁷⁵ While the impact of the decision upon theater owners is considerable, in that they now must expend presumably sizable amounts of money to bring their buildings into conformity with the DOJ's interpretation of the ADAAG,¹⁷⁶ the Ninth Circuit arguably failed to provide them with sufficiently exact instructions to be followed in fulfilling such an obligation.¹⁷⁷ Furthermore, there are persuasive arguments that the court's decision should have been made by the Access Board,¹⁷⁸ especially considering the meticulousness contained in similar accessibility rules.¹⁷⁹ Finally, it is plausible that the Ninth Circuit failed to recognize that the other ADAAG requirements make its sightline ruling difficult to enforce.¹⁸⁰ Regardless of whatever defects *Oregon Paralyzed Veterans* may have con-

175. See *id.* at 1136-37 (Kleinfeld, J., dissenting) (casting doubt upon soundness of majority's decision); see also Watts, *supra* note 19, at 18-19 (discussing contentions against *Oregon Paralyzed Veterans* based upon concreteness).

176. See *Or. Paralyzed Veterans*, 339 F.3d at 1134 (Kleinfeld, J., dissenting) (indicating that court's ruling will apply retroactively). Justice Kleinfeld also suggested that injustice could be committed by forcing movie complexes to renovate, despite the fact that these sites were "built in compliance with the law according to the best knowledge of design professionals at the time." *Id.* at 1134 (disagreeing with conclusions drawn by majority); see also Theaters, *supra* note 111, at 682 (discussing effect of *Oregon Paralyzed Veterans*).

177. See *Or. Paralyzed Veterans*, 339 F.3d at 1137 (Kleinfeld, J., dissenting) ("But architects and theater owners need to know, not only what the Ninth Circuit rejects, but what construction and reconstruction will be acceptable."). According to the *Oregon Paralyzed Veterans* dissent, it is not possible to deduce from the court's decision what would constitute minimal compliance. See *id.* at 1134 (disputing veracity of Ninth Circuit's ruling). "It is irresponsible to impose on the country a decision that will require of an industry so much reconstruction, without clear guidance on what must be done." *Id.* (Kleinfeld, J., dissenting) (impugning majority's fulfillment of its judicial duty); see also Civil Rights, *supra* note 30, at 730 (discussing dissent's criticism of *Oregon Paralyzed Veterans*' majority).

178. See *Or. Paralyzed Veterans*, 339 F.3d at 1134 (Kleinfeld, J., dissenting) (laying out preference for Access Board's pronouncement in salient issue before panel); see also Watts, *supra* note 19, at 17-18 (analyzing contentions against *Oregon Paralyzed Veterans*).

179. See *Or. Paralyzed Veterans*, 339 F.3d at 1134 (Kleinfeld, J., dissenting) ("The 'accessibility guidelines' surrounding § 4.33.3 – the one covering lines of sight – are written with great precision . . ."); see also Watts, *supra* note 19, at 18 n.122 (discussing comparable federal regulations).

180. See *Or. Paralyzed Veterans*, 339 F.3d at 1135 (Kleinfeld, J., dissenting) (stating reasons for his refusal to join majority). The dissent contended that the majority failed to properly consider these other requirements, which give meaning to the sightline obligation. See *id.* Furthermore, these provisions, taken in the aggregate, may make realization of the DOJ's goal difficult. See *id.* For example, according to Justice Kleinfeld, if the disabled can not be secluded from the general populace, yet need to be near an easy exit, the front of the theater may well be the only place wheelchairs can be situated. See *id.* (raising practical doubts about approach of the majority).

tained, it had an immediate and potentially substantial impact upon movie theater owners and wheelchair bound citizens alike.¹⁸¹

V. IMPACT

The direct effect of *Oregon Paralyzed Veterans* was to force the defendant movie theaters, and presumably all stadium theaters similarly designed in the geographical province of the Ninth Circuit, to renovate their sites to meet the nebulous standards set forth in the court's opinion.¹⁸² It also created a circuit split, as the panel's ruling clashed directly with the pronouncement of the Fifth Circuit in *Lara*.¹⁸³ The court's decision and reasoning were immediately appealing to other Circuits, as was demonstrated by *Cinemark*.¹⁸⁴ In that case, the Sixth Circuit expressly rejected *Lara* and granted deference to the DOJ's interpretation of the ADAAG.¹⁸⁵

The Supreme Court refused to hear an appeal of *Oregon Paralyzed Veterans*.¹⁸⁶ However, there is evidence that the Circuit split might be resolved by the recent issuance of the long-awaited revisions to the ADAAG.¹⁸⁷ In *Hoyts Cinemas*, the First Circuit adopted

181. For a further discussion of the certain and speculative legal effect of the case, see *infra* notes 182-98 and accompanying text.

182. See *Or. Paralyzed Veterans*, 339 F.3d at 1133 (granting summary judgment to plaintiffs as to Title III allegations).

183. See *id.* at 1133 (Kleinfeld, J., dissenting) (reporting that "[t]he majority sets up a conflict with the Fifth Circuit").

184. See *United States v. Cinemark USA, Inc.*, 348 F.3d 569 (6th Cir. 2003). The Sixth Circuit heard oral arguments on June 20, 2003, and handed down its conclusion on November 6, 2003. See *id.* at 569 (providing dates for *Cinemark USA*). *Oregon Paralyzed Veterans* was decided on August 13, 2003. See *Or. Paralyzed Veterans*, 339 F.3d at 1126.

185. See *Cinemark USA*, 348 F.3d at 579 (declaring court's view on DOJ's construction of Section 4.33.3). In full, the Sixth Circuit held:

We leave it to the district court on remand to determine the extent to which lines of sight must be similar for wheelchair patrons in stadium-style theaters, but hold that the plain meaning of "lines of sight comparable to those for members of the general public" clearly requires more points of similarity than merely an unobstructed view. In short, we disagree with the reasoning of the Fifth Circuit in *Lara*, and therefore conclude that the district court erred in holding that ADAAG § 4.33.3 merely required unobstructed views of the movie screen. We therefore reverse the judgment of the district court and remand for further proceedings in accordance with this opinion.

Id.

186. See *Regal Cinemas, Inc. v. Stewmon*, 124 S. Ct. 2903 (2004) (denying certiorari to Ninth Circuit on matter of *Oregon Paralyzed Veterans*).

187. See *United States v. Hoyts Cinemas Corp.*, 380 F.3d 558, 565 (1st Cir. 2004) (discussing pertinent legal background to issues in case). As the First Circuit explained:

The Access Board amendment, just adopted in July 2004, requires that in assembly areas of more than 300 seats, wheelchair spaces shall be dis-

part of the DOJ's interpretation of the ADAAG,¹⁸⁸ but rejected another part.¹⁸⁹ Upon remanding the case, however, the court cast doubt upon the dispositive value of the revised ADAAG.¹⁹⁰ Ultimately, while it may have added confusion to the federal judiciary and reached its conclusion on contestable legal grounds, *Oregon Paralyzed Veterans* showed considerable care for handicapped citizens and the ends of the ADA.¹⁹¹

While the ADA is laudable for its intentions, like many statutes, it encounters various problems when it is put into practice.¹⁹² Clearly, one such category of confusion involves the application of Title III to entertainment complexes, a sub-area of which is how the ADAAG relates to stadium-style movie theaters.¹⁹³ In *Oregon Paralyzed Veterans*, the Ninth Circuit was presented with precisely such a movie theater question.¹⁹⁴

persed and shall provide wheelchair users a choice "of seating locations and viewing angles that are substantially equivalent to, or better than," those "available to all other spectators." In smaller theaters, no "vertical dispersal" would be required if the wheelchair spaces provided "viewing angles that are equivalent to, or better than, the average viewing angle provided in the facility."

Id. (citations omitted). Apparently, the government argued against the Supreme Court hearing the *Oregon Paralyzed Veterans* appeal based upon, at least in part, the fact that the modified ADAAG would soon be issued. *See id.* (describing procedural posture of *Oregon Paralyzed Veterans*).

188. *See id.* at 567 ("In sum, the statutory objective can best be carried out by applying standard 4.33.3's comparability requirement to angles of sight as well as lack of obstruction In reaching our conclusion, we give some weight to the Justice Department's interpretation of the regulation.").

189. *See id.* at 567-68 ("Where our reading of standard 4.33.3 differs from that of the Department is on the second element – the 'integral' requirement – which the government says requires that wheelchair spaces always be placed in the stadium section.").

190. *See id.* at 575 (discussing disposition of case). The First Circuit stressed: One other observation may be helpful. The Access Board's amended standard 4.33.3, if adopted by the Department, goes a long way to determining for the future the extremely difficult question of how much "comparability" is required for new construction. But it is an amendment, not a gloss on the existing regulation, and therefore does not itself govern existing theaters (future alterations aside). If the parties can reach practical accommodations as to the worst of the existing theaters, the remand may prove a much simpler task than it initially might appear.

Id.

191. *See Watts, supra* note 19, at 34-35 (praising Ninth Circuit for its advancement of sound public policy and equity).

192. *See Kidwell, supra* note 41, at 747 ("The ADA is new, complicated, and difficult to interpret and apply.").

193. For a discussion of these legal issues and how various courts have treated them, *see supra* notes 55-116.

194. *See Or. Paralyzed Veterans v. Regal Cinemas, Inc.*, 339 F.3d 1126, 1132 (9th Cir. 2003) (indicating main issue of case).

Based upon a plain meaning analysis, the court found the DOJ's interpretation of the ADAAG reasonable and thus gave it deference, ruling against the defendant movie theaters.¹⁹⁵ Furthermore, the court explicitly criticized the way in which *Lara* answered the identical question.¹⁹⁶ Whatever doubts the Ninth Circuit may have had about its ruling were outweighed by its conclusion that a victory for the defendants would contravene the purpose of the ADA.¹⁹⁷ Ultimately, whether the court was correct or incorrect in its legal reasoning, the effect of *Oregon Paralyzed Veterans* will be felt beyond the borders of the Ninth Circuit.¹⁹⁸

Mattei I. Radu

195. *See id.* at 1131-32 (providing central rationale for court's decision).

196. *See id.* at 1132 n.9 ("The Fifth Circuit's reasoning in *Lara*, and the district court's adoption of that reasoning in this case, seems particularly specious in light of the Supreme Court's recent pronouncement on attempts to circumvent plain meaning in construing administrative interpretations.").

197. For a discussion of these policy considerations, see *supra* notes 136-39 and accompanying text.

198. For a look at *Oregon Paralyzed Veterans*' impact, see *supra* notes 182-98 and accompanying text.

